AN EXACT ABRIDGMENT IN ENGLISH, OF

The COMMENTARIES, or REPORTS of the learned and famous Lawyer, EDMOND PLOWDEN,

An Apprentice of the Common Law.

Concerning diverſe Caſes and Matters in Law, and the Arguments thereupon; in the times of the Reignes of King *Edward* the Sixth, Queen *Mary*, King *Philip*, and Queen *Mary*, and Queen *Elizabeth*, with the Exceptions to the Pleadings, and Anſwers thereunto; the Reſolutions of the Matters in Law, and all other principall Matters ariſing upon the ſame.

By F. H. *of the Inner Temple London*, Eſq;

Tractant fabrilia fabri.

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THE FIRST PART.

Reniger *against* Fogassa.

An Information by Reniger, *against* Fogassa, *upon the Statute of* 1. Ed. 6. *cap.* 13.

Fogassa shipped 4500 Kintals of Woad for *England*, and upon the sea a tempest did arise, and endanger the drowning of the ship; for the safety whereof, and of the men and goods in it, he casts part of the Woad into the sea, and after arrives at the Port with the residues: and before the landing, *Fogassa* came to the Collector of the Subsidie, and shewed unto him the accident aforesaid, and that by reason thereof, he knew not the certaintie of the remnant, and prayed him to make entry of 2000. Kintals of Woad, which he supposed were left; and if more were remaining, then he would pay Custom for it according to the rate when the certainty should appear; and desired licence for to land it, which 2. E. 6. in the Exchequer Chamber.

which was granted; and before the woad was weighed, *Reniger* informed against him for landing 1693 Kintals of woad more then 4500. Kintals, the Subsidie not paid, nor the Collector agreed with for it; to which he pleaded the matter aforesaid, and concluded; and *super hoc*, he did agree, and upon the agreement Issue was taken; and the Defendant gave in evidence, the especial agreement aforesaid; and upon the evidence, the King Demurs, and adjudged for *Fogassa* the Defendant, by force of a Privy Seal sent by the King to that purpose. But the opinion of all the Justices and Barons, except *Hales* and *Montague*, were with the Defendant.

1. For that this agreement *incertain*, and *conditionel*, is an agreement, and so saith the words of the Statute, which sufficeth, because the Statute is penal, and shall be expounded strictly against offenders, and shall not be intended beneficial for the King to be an agreement.

2. Admit it to be an Agreement, yet here this *incertaintie* is reducible to a *certaintie*, by circumstances, *viz.* by weighing, which shall be done by the Collector at his pleasure.

3. Admit that the agreement ought to be *certain* at first, yet here the casting out of the woad for the avoiding of greater mischief, *viz.* The drowning of the ship, men, and goods, the necessity, for the avoiding of eminent danger of death, the compulsion, for fear of death, caused his ignorance to be *involuntary*, and by consequence, his agreement *incertain*, every one of which by it self, may dispence with any law, *à fortiori*, altogether.

4. When the defendant pleads a *Special agreement* in the Affirmative, and concludes upon it, & *super hoc* agreement, the conclusion hath not waved the matter aforesaid, as if it had been in the Negative.

5. He

5. He had performed the intent of the Statute by this
reement, for when the Collector hath weighed the
ad, that he may do his pleasure, then the King
ll have an action upon the agreement, and if he
h not weigh, it is the folly of the Collector.

Griffith, the Kings Sollicitor, Agreement, or con- 5.
d executed with satisfaction in deed, or with accord,
means for recovery of recompence, is a good bar
Trespass; Executory is not; howbeit, it is the
ual assent of the parties, because it giveth neither
mpence, action, nor remedy whereby to obtain re-
pence; and therefore it is not but a void commu-
ation, and *nudum pactum*, as in 20. *H.* 6. In Tre-
s the Defendant pleads concord between them,
t he shall pay 20. *s.* to the Plantiff at a day to
e; it is not a bar, because it is not satisfaction, nor
mpence for it, because he shall not have debt after
day, so 9. *E.* 4. 19. in Trepsass upon 5. *R.* 2.
endant pleads accord, That the Plantiff should re-
r, and have the land, and that the Defendant deli-
ee the Plantiff all the Evidences concerning the
, and said that the Plantiff had entred, and that
d delivered all the evidences unto him; It is no
for it intends the proper evidences of the Plantiff,
so no satisfaction of the wrong, but if it conveys
m Title to the evidence, then it is a good bar, so
H. 6. in Trespass against him by the Plantiff,
eads, That they agree, that if the Defendant doth
ndeavor for to agree them for a Trespass by the
tiff to *S.* That then, &c. and saith, *That he did his
vor, so that they are accorded*: It is no plea, be-
no satisfaction; but if he saith, *That he hath
ded them at his own costs*, it is a good bar.

wdy the elder, for the Defendant. Arbitrement, 6.
h is Executory, 9. *E.* 4. 51. *Fitz. H.* 4. *Br.* 3. ac-
is a good bar in Trespass, because he may have

debt at the day appointed for the payment of the l
agreed to be paid in recompence, and so the Tr
is converted into another thing, *viz.* Debt b
Arbitrators, which are judges of it: and so ac
countervails satisfaction *in facto*; otherwise, it is
concord executory, 6. *H.* 7. 11. because the p
ing of the concord confesseth a wrong, and it is
reason that the Plaintiff in an action thereupon, sh
be barred without satisfaction. And so shall the
be satisfied here. Also in concord, the wrong to b
compenceed precede the agreement, but here the a
ment precedes the wrong supposed, and cometh n
ter the wrong, as in concord, and therefore this
may not be resembled to the case before of accord
certaintie at the beginning, which may be reduc
certaintie by matter *ex post facto*, countervai
certaintie, *ab initio*; as a man leaseth all his Ac
D. paying for every one 12 *d.* it is a good reserv
because when the Acres are measured, the Ren
be *certain*; so a gift of two Acres, of the one for
and of the other in Fee, by the *Frossment*, of the
shall have Fee in this *ab initio*: so *Lessee* of *white*
and *Black-acre* for life: the remainder of the
Fee, to a stranger, and the *Lessor* licences hi
to cut Trees in *white-acre*: now he shall be adj
to have the remainder of this Acre, *ab initio*; s
thing which at the commencement was *incerta*
made *certain*. So in *Wheelers* case, 14. *H.* 8. 1
a Lease for so many years as I. S. shall name, i
when he shall name the years. So 17. *E.* 4. 1. *A.* b
that *B.* shall have his wheat when he hath viewed i
please, paying 4. s. the Acre, good contra
he paies when he carrieth it away, yet the quanti
summ incertain at the first, so here, when the
ctor hath weighed the woad. And therefore this
tional agreement doth countervail an agreemen

rain at the beginning. And where acts ought to be performed strictly, yet in divers cases the performance of the intent, and not the words, good, for it intervaileth the performance of the words: So here. t performance of the words, and not of the intent, is good: as *Lit.* fol. 182. of conditions upon a *Feoffment*, for to give again to *I. S.* and his wife in special il, and they die, and the *Feoffees* make an estate to it issue, and the heirs of his father and mother, good, cause the intent of the condition is performed. So 7.
E. 4. 3. Obligation upon condition to infeoff *A.* nd he Lease for years, and Release in Fee, it is a d performance, and a good *Feoffment*, and yet the rds of a condition shall be performed as strictly as a ture.

raishaw the Kings Attorney. The mutual assent he parties upon a thing incertain, is in Law but a communication before the certainty known, as in *H.* 6. 8. A man promises in marriage with his daugh- so much as *I. S.* shall arbitrate. The party which l marry his daughter shall not have it, if he marry 8
until *I. S.* hath made his award, and appointed it; before that it is reduced into certainty, it is but communication. So in 20. *H.* 6. A man ses to *A.* for so many years as *B.* shall name, he not enter into the land, before that *B.* hath named number of years. And the witness of the Defen- which saith, That he found suerties, and hath shewed who, or what, as he ought, is wanting both he name and ability of the sureties, which the Court ht to adjudge of, as in 22. *E.* 4. 40. A man was bound to shew a sufficient discharge of an ann y, pleaded that he had offered to shew it to him, and refused to see it, and held no good plea. Agree- t according to the Statute in issue shall be intended rals *viz.* certain, and specially *viz.* incertain in

evidence proves not the issue, neither is it pursuant
issue; as in 31. *H.* 6. Upon *non est factum* pleade
debt, witnesses say, That it was delivered at an
place then it did bear date, whereupon the Defen
demurred, and the Plaintiff was barred, becaus
proved not it to be his Deed; for the delivery sh
intended where it was dated, and the witnesses
the contrary, and so the evidence wartants no
issue; so in 18. *H.* 6. 16. One deed of Le
life without Livery given in evidence, shall not m
tain upon Free-hold, pleaded the issue; so in
E. 3. Upon traverse of a gift in Tail, the witnesses
that another made the gift, and awarded that the
tiff should be barred, so if he had pleaded the g
agreement in bar, and special in the rejoinder, it
departure; as in 6. *H.* 7. 8. In Trespass the De
ant pleaded a descent to him, and the Plaintiff
That after the Defendant infeoffed him; an
Denfendant said, That it was upon condition,
for breach thereof he entred; this is a departure
8. the Bar, for it is a new matter. For the same re
special agreement in evidence shall not maintai
generall issue; one witness is not enough, nor one
for to try an issue, if more were warned by the S
8. *E.* 3. 50. So here the Defendant had but on
ness which proves for him, which is not sufficien
so judgement shall be given for the King.

Athens for the Defendant. A witness produc
prove a thing, if he saith, That he knowes noth
the matter, his deposition is void; so, if he depo
gatively, as to say no more was not entred th
much, and if no witness, the knowing of the
bid not the tryal of the matter; and a Verdict
contrary to the testimony of witnesses, good. It
needfull to aver that, which of necessity must be
ded; as that the King hath a Beam there; specia

ment is an agreement, as a Feoffment upon condition, is a Feoffment, and so this word *Agreement*, includes every agreement, by which the evidence well maintains the issue. The Statute speaks not of surety, and peradventure intends it not, and therefore in vain to speak of it; and therefore it may be he hath not answered to this exception. Agreement in our Law is threefold, *viz.* Executed at the beginning of it, with payment intended, by the Statute of 25. *E.* 3. *cap.* 3. which saith, *That goods bought by fore-stallers, are forfeited to the King*, if the buyer had made agreement with the seller; such agreement is not meant in our case, because then the Statute should not be intended in the disjunctive; for then the first, and the second clause should be all one: but the word, [*Or*] disjoyns the clauses. Agreement to an act made by another, as in 20. *E.* 4. 9. To a disseisin to his use, maketh him a disseisor from the beginning: so the party ravished, to agree to the ravisher, is an agreement executed here because nothing is to be done afterwards, and agreement here may not be an executory agreement, because the performance shall be afterwards, yet both parties accord at one time before, & 26. *H.* 8. *cap.* 3. intends such, because it speaks of payment, or agreement for first fruits, *&c.* and common usage to pay after, upon obligation made before, proves this, which intends agreement executory; and here agreement is intended executory, because it is not the first, nor the second; and an agreement executory, is *Duplex*, the one certain at the beginning, as this of first fruits, the other by matter *ex post facto*, upon certainty to be known, as here; and such agreement executory, the Statute will warrant; for no Law will punish him, in whom there is no default,

9.

and where he cannot prevent the mischance by no possibility, for the necessity of the matter, and for that inevitable chance shall not prejudice any: 20. *H.* 7. 11. *Fineux*: A man by the Common Law may kill another in his own defence, or as a champion, for the necessary safeguard of his life, and the Tryal of right; so notwithstanding the custom of the Realm, new *Natura brevium*, 94. *b.* If enemies of the King steal of Guests, the Hostler is discharged, because he cannot resist. So if the ship were on fire, the casting of the goods on the land without payment, or agreement for the Subsidie, shall excuse the Defendant; so here the extremity of the Tempest, doth excuse the vigor of the Statute. 10.

Sanders, the Kings Serjeant. Notwitstanding that an agreement conditional is included in the words of the Statute, *viz. The Collector not agreed with*; yet every Statute, although it be penal, shall be taken as the makers intended; for the Statute of Waste, is; *If any make waste in Lands which he holdeth by Demise*, &c. yet if his Estate be *Ex ligatione*, it shall be punishable in waste; and yet the Statute gives *Ex demissione* onely; *suo de assignat.* and so it is holden, 10. *H.* 6. 8. But *Glouc. cap.* 5. *W. cap.* 14. *nor Marlebridge, cap.* 13. *speak nothing de demissione.* So, *quia emptores terrarum*, viz. *W.* 3. *speaks secundum quantitatem terræ intend. valere.* So 4. *E.* 4. 12. An Information for shipping Wooll without sureties, of the carrying of Bullion according to the 14. *E.* 3. the last chapter, holden good, because the finding of sureties is not repealed by the general words of 36. of *E.* 3. *cap.* 11. which giveth the old custom of half a Mark for every sack after three years, nor of 45. *E.* 3. *cap.* 4. which imposeth no charge upon Wooll, other then

Custom,

Custom, and Subsidie granted to the King, and without assent of Parliament; and the two last Sta. intend not for to discharge Bullion, but great Subsidies upon Woolt after 3. years; so that the mind & intent of the makers shall expound the general, and doubtfull words of Sta. and abridge the generality of them. so here it shall be intended an agreement certain. Also because the Commons pray the King, That he will be pleased to accept of their Grant, for that the words of the Statute, which is their Grant, shall be taken more beneficial for the King, and most strong against the Grantors, according to the Principle of the Common Law, in case of a common person. So the Statute of *Prerogativa Regis*, 17. *Ed.* 2. *Rastal*, *wards* 13. is the Grant of the Commons to the King, which saith, The King shall have the custody of all the Lands of such which hold of him by *Knights service in Capite*, whereof the Tenants were seized in their Demeasne, as of Fee at the day of their death, of whomsoever they hold also by like *Knights Service*, and notwithstanding that *Fee* is commonly taken to be *Fee-Simple*, yet the King shall have of *Tail* because it shall be construed most strongly for the K. where it hath two intendments. Agreements upon which the Common Law giveth no remedy, are void, and not good; as in 19. *H.* 6. 36. Upon an information for the forging of false Deeds, the Defendant pleads Arbitrement made, *viz.* That the Plaintiff shall not farther prosecute his Writ against the Defendant; and saith also, That the Defendant shall be *non-suited* in the Assize; This is no Plea, because *non-suited* sounds not in satisfaction, and cannot compell him to be *non-suited*: for the award is not good, if it be not executed wholly, or the thing awarded may be recovered

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vered by action; and therefore in 6. H. 7. 10. In Trespass, to say, That he hath paid money, but he hath not made his windows, which the Heir may compel him to do, for the concord is intire, but wants execution in all; and indeed before action brought, is not good, then it is performed, yet not immediately, and therefore it was held no Plea. So in 17. ass. pl. 5. A Baily known pledge the Ox of his Master for Wheat, and if he pay not, &c. he shall keep the Ox alwaies. This shall bind the Master, because the wheat cometh to his use, otherwise not, because he had no recompence. So in 17. E. 4. 1. In Trespass for the taking of wheat, the Defendant pleads, That the Plaintiff sold it, if he liked it upon view, he should have it, paying 40. d. and afterwards he saw it, liked it, and took it; this is no good justification, because he doth not alleadge payment, so here. So contracts conditional are good, when they are performed, but before performance, they are onely communications.

Brook, Recorder of *London*, for the Defendant. Where matters are to be tryed in the Civil Law, there ought to be two witnesses, here not necessary. For where tryal is by twelve men, because the Inquest may give a precise Verdict, where there is no Testimony, or Verdict, or Evidence, or Evidence be contrary to the Witnesses, as in 14. H. 7. 3. *the Inquest* acquit one indicted of murther; he is arrained, and acquit; *the Jury* shall say, *who killed him?* although they have no witnesses, and so witnesses are not necessary, but where the matter is to be tryed by witnesses onely; for if the witnesses were so necessary, then it would ensue, That the Jurors should not give their Verdict contrary to the witnesses, where the Law is meerly contrary, for

where

when witnesses for tryal of the Fact joyn with the Jury, if they cannot agree with the Jurors, the Verdict of the 12. shall be taken, and the witnesses rejected; wherefore this point is clear enough. And as to this which hath been said by *Bradshaw*, That the deposition of *Da.* will make against us; for that he saith, That *S.* shewed to him, that the entry was not made for more then 2000 Kintals: Sir, this saying is nothing to the purpose, for if he cannot say something to prove the issue, in which he cometh to depose, then it is neither with us, nor against us, but it is of the same effect in Law, as if he had said nothing, or that he knew not of the matter; and so this point is also clear enough. And as to that which hath been moved also by Mr. *Attorney*; That he ought to shew what rate in certain: Sir, this needs not here, because it is expressed in the Statute, 12.d. of every 20.s. and of general Statutes every one shall take notice. And he argued and said; That the agreement here shall be good, and is within the intent of the Statute; for in many Cases, Gifts, and Grants made, will not be certain at the beginning, and yet shall be good, for that there is a mean to reduce them afterwards to certainty, and yet the nature of Gifts, and Grants is to be executed presently, and every Gift is an agreement between the parties, and so is every Grant; and then if Gifts and Grants, (which are also agreements, and the nature of which is to be executed properly at the time of the making of them,) it shall be good, notwithstanding they are incertain at the beginning *à fortiori*. Agreements Executory of things shall be good, where they are incertain at the first, and to prove that such Gifts, and Grants shall be good, notwithstanding their incertainty at the first, there

are

are many Cases; and therefore if the King at this day grant over certain Lands, which have come to his hands before, and Grant over to the Grantee such Liberties, Priviledges, and Jurisdictions, howbeit that the King knoweth not the certainty of the Liberties, &c. yet the Grant is good. So in 9. *H.* 6. 27. The King grants to the Dutches of *York* an Island, with all Issues and Amerciaments, &c. there it is holden that the grant is good, yet the King knew not what Issues, or what Amerciaments shall be afterwards forfeited; but for that, that when they shall be forfeit, they will be certainly known, and so hath a means to know the certainty of them; this is the cause that the Grant shall be good. And so in 5. *E.* 4. *the King* Granted to one called *Garter*, the Office of *the King of Heralds*,
23. *cum feodis & proficuis ab antiquo*, &c. There this Grant purports a certainty of the Fees, and Profits belonging to it, and therefore good. And so in 30. *H.* 6. The King Grants all such Lands as came to him by Attainder, &c. it is good, although it comprehends no certainty. And so if the King will pardon all Riots, *Pardon is good*; howbeit, it comprehends no certainty. 21. *H.* 6. 42. A Parson grants to me his Tythe-wooll the next year, or perquisites of his Court, the Grants are good. So *Perkins* 17 Feoffment of two Acres, to hold the one for life, the other in Fee, without saying he shall have Fee; if he lose both by default, he may have *Quod ei deforceat* for the one, and Writ of right for the other. So if one grant a rent charge to another, the Grantee may avow, or have a Writ of annuity. So in 9. *E.* 4. 36. *per Litt.* Grant 20 *s.* or a garment, good, because certain by the will of the Grantor. So a Lease for so many years as *I. S.* shall name, is good. So *Perkins* Fol. 17. If I have a black

a black and white Horses, and I give one of them to *I. S.* this gift is good, notwithstanding the uncertainty by the election of the Donee. And although it is not concluded who shall weigh, and when, yet it is good, because there is an Officer in every Port which keeps a Beam, and ought to weigh. And although the Statute do speak of an agreement certain, yet Law, the reason alwaies exempts something out of the prohibition of the words of Statutes, as 15. *H.* 7. 2. by *Keble*, a Prisoner which breaketh Prison, by the words of the Statute is a Felon; but if he break not when it is on fire, not. So 14. *H.* 7. 29. *Stamford*, 25. *cap.* 5. Jurors severed by a great Tempest, shall not be Amerced, and their Verdict good. So *W.* 2. *cap.* 5. Gives not to a Feme Covert *Receipt*, but where the wife is ready to answer, yet the wife received by prayer in aid, 20. *H.* 6. 48. and there she is received, where she is not ready to answer, because otherwise she shall loose *the recompence* by *warrantie*. So *W.* 2. *cap.* 1. say, That *Dones* shall not alien; yet 3. *E.* 2. is intended of their Issues, so here, for to avoid mischiefs, *&c.*

Harris the Kings Serjeant, to the contrary. And he argued as the Kings Attorney did, that is to say, That the evidence which proves the agreement upon condition, warrants not the issue, which shall be intended a general agreement, as if the Defendant in Tresp. plead not guilty, and give a licence in evidence, or in *formedon in discendre*, upon a gift in free marriage: if the gift is traversed, and a Deed is shewed of the gift in free Marriage, *the Remainder* over in Fee, or upon traverse of a Lease for years, alleadged without Deed, and the Deed is shewed in evidence, this evidence warrants not the issue: So here an agreement con- 14.

tional maintains not the general agreement intended in issue; the Collector could not agree otherwise then for landing, because the Statute will, as if a Baily pay the debts of his Master, he shall not be allowed for this in his accompt, without specialty; but if he pay Quit-Rents, issuing out of the Land, he shall be allowed for this, for that the payment of this belongeth to his Office. And so if the Collector accept another Agreement then is intended by the Statute, this shall not help the party; and said, that agreement upon condition ought to be performed before it be pleaded; as if I give all the money in my purse to I. S. he cannot have his action for it, except that he alleadge the certainty of it; So here: wherefore judgement shall be given for the King.

Pollard, Serjeant for the Defendant. An agreement upon condition, is an agreement, as a Feoffment upon condition, is a Feoffment, and included in words of the issue, (that is to say in this word *Agreement*, which contains every agreement. So 36. H. 6. 2. In debt upon a Recognisance, and the Defendant saith, That there is no such Recognisance, whereupon they were at issue, and at the day, &c. a Recognisance with condition was certified, & held good, and that he had not failed of the Record, because a Recognisance upon condition is held to be a Recognisance. So here, the agreement general was put in issue, the which shall be intended the more common agreement, and this is the general agreement, and the evidence given by *W.* proves a special agreement, *viz.* an agreement upon condition, which is other then the agreement tendred by the issue; & therefore the Demurrer shall be adjudged for the King, and Informer. Sir, as to this I answer; That by the arguments made before,

ore, nothing hath been put in issue, but if they a-
ree according to the Statute; so here admitting
hat the agreement general had been in issue, but the
special is: The especial matter, *viz.* Tempest,
& super hoc agentvit, are in the affirmative, and
ay stand together; and therefore both remain as
ne entire matter, and substance of the issue. As
f the Tenant pleads special Bastardy against the 15.
Plaintiff, *in mort D'ancestor*, and alleadge this
ncertain, as he ought, *viz.* That the Plaintiff was
ngendred between *I.* and *A.* and born before mar-
iage, & then they marry and conclude as he ought,
nd so Bastard; This conclusion hath not avoided
he special matter before, for if so, then it should be
Bastard generally, and triable by the Bishop, and
hen shall be by him certified *Mulier*, because such
s a *mulier* in the law spiritual, but shal be tried here
y Assize; and therefore the special matter remains,
nd the issue is taken thereupon. So 3. *H.* 7. 5. by *Ke-*
le. One counts of a gift *in formedon*, and being
emandant, maintains it by recovery in value, by
eason of a Warranty; and so gave; the Tenant
ught not to traverse *the conclusion, viz.* as he should
o if he had avoided the special matter before, be-
ause it is matter in fact, triable by the Countrey,
ut he ought to answer to the recovery, triable by
Record, which proves, That the special matter
efore the conclusion shall remain. So 32. *H.* 6. 14.
y *Litt.* If the Plaintiff in Assize makes to himself
Title, and concludes, and so he was seised until
y the Defendant disseised; now if this conclusi-
n hath avoided the especial matter before, then it
ouch that the Defendant cannot answer to the
itle; but the Law is, That he ought to answer to
e Title, and traverse it; by which it is proved,
at the conclusion hath not avoided the especiall

matter

matter before; and in all these cases the matter b
fore the conclusion, and the conclusion, are in
Affirmative; as in Debt, the Defendant plea
payment, and so owes nothing; and in Trespa
the Defendant pleads a gift of the goods, and
not guilty; when it is agreed between any, T
a principal thing shall be done or had, and bef
that this may be done or had, there is another thi
first to be done, which is not certainly agreed w
shall do the other thing; the Law appoints hi
which hath the most skill, to do the said ot
thing. So 9. E. 4. 4. One is bound to make
great Bell of M. tunable with the other Bels, th
in that case to say in Debt by Obligation, That
Bell was not weighed, judgement If action, is
Plea, because in construction of the Law he sh
weigh it, for it belongeth to his Office. So a T
lor bound to make a gown, shall shape the clot
So here the Collector in behalf of the King, sh
have the Subsidie which is the principal thing; a
therefore he shall weigh, for it belongeth to his O
fice to try the certainty, for without certainty
King may not be satisfied. And in Trespass, b
cause that he justifies the necessary circumsta
and mean, or hath Title to the principal thing;
16. 2. R. 2. Fitz. Bar. 333. and Perkins, fol. 33.
may cut and carry trees granted to him, and ju
fie it, although the grass is spoiled by it. So
may take Fishes in a Pond with Nets, and just
it, but if he digg a Trench to drain out the wa
not. A Collector may weigh when he pleases;
where one shall have benefit upon the first act to
done by him, and no time is limited when he s
do it; the Law saith, That it shall be done at
pleasure: So the Mortgager shall pay when he pl
leth, when no time is limited; so one may marry
daugh

daughter of *A.* when he pleaſeth, if no time be limited: ſo in the principal caſe, for as much as payment ſhall be made to the Collector upon the weighing, and no time is limited for the weighing, the Law refers the time of it to the will of the Collector, and ſo the agreement is good and perfect. 3.*H.*7.11. The Sheriff takes *A.* by *Capias*, now he doth well, but if he return *non eſt inventus*, then he ſhall be a Treſpaſſor *ab initio*; but here the not weighing, becauſe the King refers this to the Collector in the behalf of the King, in his default the agreement ſhall not be made void *ab initio*, in prejudice of the Defendant, which before was good, notwithſtanding that the agreement ſpecial is an agreement, as *Sanders* confeſſeth; yet it ſhall be conſtrued beſt, *viz.* general for the King, as he urged. The rules of the Common Law in the conſtruction of Statutes, prohibite this; for Statutes Penal ſhall be taken and reſtrained to their general words, favourably, and to the benefit, and not prejudice of him againſt whom the pain is inflicted, and ſhall not extend farther then the words, as *W.* 2. *cap.* 40. ſaith, where the husband aliens the land of his wife, *quod ſecta mulieris non differatur*, &c. *per minorem ætatem hæredis qui warrantizare debet*, and ſaith not the Heir of the husband, nor of a ſtranger; yet 18.*E.*4.16. and 17.*E.*4.59. & *poſtea* 47. the parol Demur, *in cui in vita per monage* of the ſecond vouchee, becauſe he was not heir to the husband, and ſo becauſe penal *here in favor of him it is reſtrained* to the heir of the husband onely: So by *W.* 2. *cap.* 11. an accomptant found in arrearages, ſhall be impriſoned by Auditors, and ſaith not when, in 27.*H.*6.8. In debt for arrearages of accompt, it is adjudged, That if the Auditors do not commit the accomptant to priſon 17.

presently after the accompt; and therefore the generality of time is restrained to a particularity, by the rule of the Common Law in construction of Statutes, and also by the intent of the makers; for if the scope and end of the matter is satisfied, all the matter, and intent of the matter is accomplished: and the scope of the Statute here was, That the King shall have the Subsidie, and the agreement here sufficeth for that, because it authorizeth the King to weigh Woad by the Collector when he pleaseth, and then the King hath Title of Action, and so the surety of the King thereby is referred to will. Also such agreement hath been allowed upon the same words of former Statutes for Subsidies. Also if the Statute had expressed the agreement in certain, yet agreement uncertain should have been good here, and out of the penalty, because the infringing of the words of the Law, without the infringing of the intent of the Law; for upon some accidents the law priviledges some thing done against the words of the Law, of the nature of the Law of this Realm, and of other Realms, and the Law of God: *viz.* First, for to avoid greater inconveniencies. Secondly, for necessity. Thirdly by compulsion. Fourthly, by involuntary ignorance. First for the avoiding of greater inconveniencies; as 22. *ass. pl.* 6. where a man of *non sane memory*, and in his rage did great hurt; and another man and his parents took him, bound him and beat him with rods; and here it is holden that they might justifie this in avoidance of greater damage, being of *non sane memory*; and yet the Law of nature, and of the Realm prohibites battery, but this particular case for the avoiding of greater mischief, hath one exception, and special priviledge So 1. *H.* 6. 9. The Lord (contrary to the Statute

Ma

Marlebridge,) may lead the Distress from the Land into another County where the Mannor is; for it should be prejudicial to the Lord, if he should not carry the distress to his Manor. Amongst the Romans they had a Law, That every one which should scale the walls in the night, should be condemned to death; and one in the night did scale the walls in the time of War, to discry enemies to the Romans, and he by the judgement of the Senate was not onely discharged, but had a reward therefore; so such interpreting of Laws, is a tempering of the rigor of the Law. Secondly; *necessitas non habet legem*; and therefore it is a good excuse in every Law, as 38. *H.* 6. 11. Increasing of water excuseth a default in a *precipe quod reddat*, because he could not appear without danger of death; yet the Law abhors every default, because it is in contempt of the Court: So *David* did eat bread for necessity, although prohibited by the Law of God. Thirdly; compulsion excuses in Law, as the avoiding of an obligation made by dares: So if the arm of any man is drawn by compulsion, and a weapon in his hand kill another, this shall not be Felony, nor he damnified, because he did it by compulsion. Fourthly; involuntary ignorance doth excuse: as 3. *H.* 7. 1. *Kell. fol.* 268. An infant killeth another, it is not Felony, because he hath not discretion, and it shall be imputed to his ignorance, which is involuntary by compulsion of nature; & so no default in him. So *Fitz. Nat. br.* 202. if one of *non sane memory* kill another because of ignorance by compulsion, *viz.* the hand of God, and such other things done by ignorance, because not to be resisted, and this involuntary ignorance is cause of the Act; and therefore he which kills another by involuntary ignorance, *As by th*

fall of a hatchet out of his hand, shall have Sanctuary
Deut. 19. But ignorance voluntary is not privi-
ledged; as if a man killeth another, because this ig-
norance cometh by his own act and folly, which h
might have resisted; and therefore shall not be pri-
viledged, because he himself was the cause of suc
ignorance, if any were *à fortiori* in all the case
together before mentioned, shall excuse, for th
Law is not offended for the said four causes; th
incertainty of the agreement here, and therefore i
as much as the Statute saith, *The Collectors not a-*
greed with, and so gives him authority to agree wi
the Collector, and the Defendant hath made a Speci
agreement with him, which is an agreement
and so within the words of the Statute; it seemet
that by the rules of the Common Law used in co
struction of Statutes, is by the intent of the m
kers, and by all reason and equity shall be adjudg
a sufficient agreement, and warranted by the St
tute; and therefore demanded judgement again
the King, and so it was adjudged: But all t
Judges were of opinion against the King, one
Hales and *Montague*; and afterwards the King se
his Privy-Seal.

Colthirst against *Bejushin.*

21. Tr 3 E. 6 in the Common-Pleas.

En Trespass, the Defendant pleads a Lease f
life to *H. B.* and *E.* his wife remainder to
son *W.* for his life *si ipse habitaret, & resideus e*
in and upon the aforesaid Grange and Farm;
if he should dye in the life time of *H.* and *E.* t
to remain to *B.* the Defendant for his life; i
also would inhabite there during the Term af
said, and saith, That *W.* did dye in the life of

and *E.* and after *H.* and *E.* dyed also, and the said *B.* now Defendant, entred without shewing in certain when, and took averment that he had inhabited there alwaies after his entry, and upon this Plea, the Plaintiff Demurs; and it was adjudged against him for the Defendant.

1. For that the averment of his continual residence, is surplusage; and therefore the incertainty thereof *nil refert*, by *Harris*, *Hinde*, and *Montague*.

2. It is not a condition compulsary, but a thing elegible, at the discretion of the Defendant, (by *Montague*) and then his entry is not material, but at his pleasure.

3. Admitting that it be a condition, yet it is subsequent, and in defeasance of his Estate; and therefore ought not to be shewed by him, which shall have benefit thereby: the contrary is of a condition precedent.

4. For that it is pleaded by way of Bar, and being certain to a common intent, it sufficeth, and it shall be intended that he entred immediately after the Remainder happened; but by *Hales* Justice, this common intent ought to be of a vehement presumption, and not indifferent.

5. That this word, *if W. dye, then this shall remain*, is a limitation of time when this shall vest, and not a condition by *Hinde*, and *Montague*.

6. Admitting that it be a condition, yet a remainder may depend upon a condition. By *Hales*, *Hinde*, and *Montague*, and adjudged accordingly.

7. The Plaintiff hath not conveyed to himself Title, to have benefit of the breach of the condition, if it be broken. By *Montague*.

Pollard, Serjeant for the Plaintiff. Except the the Form of the Plea is ſufficient. 1. Becauſe he doth not aver his continual reſidence after the Remainder happened, but after his entry, which may happen to be long time after, and ſo although that he hath performed the words of the condition, which hath not ſatisfied the intent thereof; yet he hath not performed the condition, becauſe the intent was, That he ſhould have all the Mannor. So 21 *H.* 6. 10. A man is bound that his Feoffees of the
24. Mannor of *D.* ſhould grant a Rent of 40 *s.* to the Plaintiff. He had three Feoffees, and two of them grant the ſaid Rent to him, and there all the Juſtices ſaid, That it ſhall be intended all the Feoffees ſo that alwaies the intent of the condition ought to be as well performed, as the words of the condition; and here the intent of the condition appears to be, That Hoſpitality ſhall be kept upon the Grange continually from the beginning to the end of the Term, which is the death of the Husband and the Wife; and here he hath not ſhewed that he entred within as ſhort time as he conveniently could after the death of the Husband and Wife, and therefore becauſe he hath not ſhewed and averred this, he hath not ſhewed the performance of the condition, and therefore his plea is not good: For in all caſes where the time is iſſuable, he ought alſo to ſhew it certainly, and therefore in 32. *H.* 6. it is held, That if a man plead a Leaſe for years made to him, that he ought to ſhew what day the Leaſe was made, becauſe it is iſſuable. So in 33. *H.* 6. 44. In debt by an Executor the Defendant ſaith, That the Teſtator made the Plaintiff, and one *R.* his Executors at *L.* the which *R.* is alive and not named, judgement of the Writ, and the Plaintiff confeſſing it, ſaith, That after this time laſt aſſigned by

by the Plaintiff, that the Teſtator made the Plaintiff his ſole Executor in *Middleſex*, and the Defendant ſaith, That after this time laſt aſſigned by the Plaintiff, that the Teſtator made the Plaintiff and *R.* his Executors after this time, and the Plea of the Defendant was not held good, for that the day on which the Plaintiff, and *R.* were made Executors, is uncertain. So 3. *H.* 6. 33. In Treſpaſs the Defendant pleads in Bar the day of the retaining of the Plaintiff, who traverſeth the Bar, and the Defendant enforced to ſhew the day certain. As to the matter in Law, it ſeemeth to him that the Remainder is void, becauſe it ought alwaies to be limited to take its effect after the partricular eſtate ended, and not during the particular eſtate; for if it be limited, and appointed to take its effect, during the particular eſtate, then it ſhall be utterly void. As if *A.* Leaſes to *B.* for life, the Remainder for life; and if *B.* dies, that it ſhall remain over to a ſtranger in Fee, this Remainder is void, for that it is appointed to take effect immediately after the firſt eſtate for life ended; for if the Remainder in Fee ſhould commence, then it ſhall avoid the Remainder for life; ſo if a Leaſe be made to two, the Remainder over in Fee after the death of the firſt of them; this Remainder is void, becauſe the Survivor ſhall have the Land. So in the principal caſe it is given to the Baron and Fem for their lives, the Remainder to the eldeſt ſon for life upon conditon, That if the eldeſt die, living husband and wife, that then it ſhall remain to the Defendant for life, which cannot be; for the firſt eſtate at this time continues, and if the Remainder ſhall be good, it drowns the eſtate of husband and wife, and therefore the Remainder void, and alſo for that it is limited to commence upon condition, 25.

Matter in Law.

which enures alwaies in privity; therefore if a leaſe for life be made, rendring rent, and upon condition, That if the Rent be arear, that then it ſhall remain to a ſtranger in Fee; if the Rent be arear, and not paid, the remainder is void; for the Remainder which commence upon condition, is not good, otherwiſe it is, if an eſtate be made for life upon condition, That if the Tenant for Life dies, it ſhall remain over, this Remainder is good, becauſe that it commenceth upon the Determination of the Eſtate, the which is certain; and therefore no condition, becauſe conditions are alwaies incertain, and may be performed or broken; and as our Law is, for to know the time certain when the things paſs from one to another, and namely Free-hold, becauſe the Law hath it in greater eſtimation then other things, and ſo to prevent contention, hath ordained Ceremonies to be uſed, as in every Feoffment, Livery, and in every Grant, Reverſion, or Rents, *&c.* That Attornment ſhall be made, the which are points certain containing time, and by them Eſtates paſs. The Law hath appointed that every Remainder ſhall have three things by the matters aforeſaid, as Notes and Rules certain for to diſcern when good. The firſt is an Eſtate precedent, made at the ſame time that the remainder Commences, and that the particular Eſtate continue when the Remainder veſts, and that the remainder be from the Donor at the time of Livery, and if any of the ſaid three things fail the Remainder is void. And therefore for the firſt point, if the Leſſor confirm the ſtate of his Tenant for years, the Remainder in Fee; this Remainder is void, for that the Eſtate for years was made before the Remainder. So if a Leſſor diſſeiſe his Tenant for Life, and after makes a new Leaſe to him for Life,

Rules to know when Remainders are good.

Life the remainder in Fee; this Remainder is void becauſe it is a Remitter to his Eſtate. So an Eſtate precedent was not made at the time of the remainder, and therefore the Remainder is void. So the Heir endows his Mother Remainder in Fee, by reaſon of Relation, and ſo the precedent Eſtates are made before the Remainder appointed. Secondly, That the particular Eſtate continue when the remainder veſts, as 21. *H.* 7. 12. *per Frowick*, Leaſe for Life upon Condition, That if he doth not ſuch an Act, that his Eſtate ſhall ceaſe, and that then the Remainder over is void, becauſe the Eſtate precedent is determined before the Remainder appointed, and the Remainder muſt veſt during the particular Eſtate. Thirdly, becauſe the Remainder paſſes from the Leſſor at the time of the delivery, as *Hales*, *Hinde*, and *Montague* ſay, and as it is proved by the Caſes before cited. So *Perkins*, 12. and 19. Remainder to the right Heirs of *I. S.* in Life, paſſes from the Leſſor preſently, although it veſts not preſently; but here the Remainder paſſeth not preſently, becauſe the Condition precedes the Remainder, as 15. *H.* 7. 1. if *A.* Grant to *B.* That when he is promoted to a Benefice, or do ſuch an Act, he ſhall have an Annuity; there he ſhall ſhew his Promotion, if he demands his Annuity, becauſe it is a Condition precedent, and to him which maketh the Grant; but if he Grants an Annuity until he be promoted, there he ſhall not ſhew it, becauſe the Promotion is ſubſequent to the Annuity, and will defeat the Annuity; and therefore it ſhall be ſhewed by the other party, which is contray. So 7. *E.* 3. 10. A 26.
Leſſee for eight years, rendring 10. s. yearly, and he holdeth over to him and his heirs, an action of Debt is maintainable during the Term, for the

Rent

Rent is a Chattle, because the Fee passeth not p
sently, for that the Condition precedes the
So 6. R. 2. a Lease to two for years upon Co
tion, That if the Lessee aliens within the Term
die, he shall have Fee: it is holden that the
passeth not presently, because the Condition
cedes it; which Cases prove, That the Rema
der passes not out of the Lessor at the time of
Livery, albeit that the Condition precede the
mainder; and proves also, That the Remain
Commenceth upon Condition; and proves a
That the Remainder is appointed to begin a
the Commencement of the particular Estate,
which is contrary to the grounds of Law,
therefore, and for the said other causes, the
mainder shall be void. And so for the insufficie
of the matter of the Bar, and Form also, the Pl
tiff shall recover.

Cook, Serjeant to the contrary. As to the
Exceptions which have been moved, That the P
is not good, because he shews not that he hath b
resiant (after the deaths of the Husband
Wife) alwaies, nor what day he entred. Sir, I
it, That it shall be taken, that he entred immedia
after the death of the Husband and Wife, for
Defendant hath pleaded by way of Bar, and if
Bar hath matter of substance, and is good to a co
mon intent, it sufficeth, although it be not good
every special intent; and therefore in the Cas
33. *H.* 6. *fol.* 24. where the Defendant plea
That the Testator made the Plaintiff, and one
his Executor, Judgement, *&c.* The Plea was goo
without shewing that he was made after that
Plaintiff was made sole Executor, because it
be intended after. So 10. *H.* 7. 15. by *Kyble*;
Trespas the Defendant pleads his Free-hold goo
becau

becauſe good by Common intendment; yet the Plaintiff might have an Eſtate for years, and it may ſtand with his Bar, and by which he may puniſh the default, but ſuch ſpecial matter will not be intended. So 6. *E.* 4. 1. in Debt upon an Obligation the Defendant ſaith, That he hath done ſuch things as was contained in the Indenture, and at Iſſue, and found for the Plaintiff, and ſpoken to in Arreſt of Judgement, becauſe the Defendant ſaid not that the two Covenants were all, and ſo had not alleadged the performance of all, but held good, becauſe by Common intent there ſhall not be intended more then two Covenants, if the Plaintiff ſhew not the contrary. So 3. *H.* 6. 4. in Formedon he gave not *prima facie*, a good Bar, becauſe it intends a general gift; and yet it may be, That the Land was recovered in value, and then the Plea is not apt, for other Land was given. So 3. *H.* 6. 3. In Debt, nothing in their hands pleaded by Executors, good; yet it may be that other goods firſt, not the Teſtators, at the day of his death, are come to their hands in place, inſtead of other goods. So 21. *H.* 6. 17. In Aſſiſe the Defendant was in by diſcent, where he had a mean Title, which tolled the Aſſiſe of the other, & ſhall not be void by the ſaid recovery; but this ſhall not be intended without ſhewing; ſo diſcent and entry in Bar, good; yet it may be that a ſtranger abated, and dyed ſeiſed, and the Heir could not enter; but it ſhall not be intended without ſhewing ſpecially; but when a thing Commenceth in reſpect of the time, then the certainty of the time ſhall be ſhewed, *fol.* 24. 27. 33. as 20. *H.* 7. 12. by *Rede*. A Servant, which demanded 20. s. Sallary for his ſervice by the year, ought to ſhew the expiration of the year, becauſe the Action is given

in

in respect of the year past, and the time is part of the cause of the Demand, and precedes the Demand; but here the time pursues the Remainder and is not cause of the Remainder; and therefore we ought to shew it so certainly, as where the gains a thing, for here it goeth in defeasance of the thing; and therefore the Bar is good, notwithstanding the said two Exceptions; besides, it seemeth to me the Remainder is good. For first, he hath an Estate here, upon which the Remainder may be grounded; & here the remainder is appointed thereupon, but the cause wherefore the Remainder shall not be good, is alleadged in two great points, *viz.* because the Fee passeth not presently forth of the Lessor, and also for that the Remainder cannot pass upon Condition. And it seems to me, That the Remainder passeth out of the Lessor presently, howbeit that it vests not presently as in *Litl.* 81. A Lease for five years, if he live within the first two, that then he shall have Fee, the Fee passeth out of the Lessor presently; so the Remainder to the right Heirs of *I. S.* in life; and the Remainder may Commence upon Condition, as a Lease for life upon Condition, That *I. S.* Marry my Daughter during the state for Life, which shall remain to him, is good, because he hath an Estate upon which it may be grounded. So 34. *E.* 3. Devise for Life upon Condition, That if the Heir to whom the Reversion discends, disturbs Tenant for Life, or his Executors of their Administration, That then the Land shall remain to the Daughter of the Devisor, and to her Heirs, and dyeth Tenant for Life dyeth, the Son of the Daughter brings his Formedon against the Heir, because he disturbs the Tenant, and also the Executors of the Tenant traverse it, and at issue, and upon this Issue

is joyned, which ſhould not have been ſo, if the Remainder had not been good. Alſo if Aſſent, as 18. *E.* 4. 12. by *Catesby*, *ante* 8. *poſt* 31. to the Diſeiſen made before to anothers uſe, may Traverſe the Free-hold from one to another, *a fortiori* a condition may, namely where the Franck-Tenement precedes, to which a Condition may be annexed.

Morgan, *Serjeant* for the Plaintiff. The Plea is not good, becauſe it doth not ſhew the day in certain, of the death of *W.* nor of the Husband and Wife, but he argued not this. Alſo it is not good, becauſe he ſhewed not the day of the entry for a Bar good to a Common intent, is not good; becauſe parcel of the Subſtance is left out, and becauſe *Durante termino*, is for all the Term; for that the time, which is parcel of the Subſtance of the Bar, ought to be ſhewed as the Obligee infeoffees fee; another before *M.* he muſt ſhew in certain what day he did infeoff him. So 3. *H.* 7. 3. the Lord which Leaſeth within the year, entred for Mortmain, for otherwiſe it ſhall not be intended for to enter within the year, if he doth not ſet it forth; but the Bar is good where ſuch things are limited, becauſe that by ſpecial, and not by general intendment they are omitted; as a Feoffment in Bar is good to a Common intent, yet it may be, That the Feoffor was within age, or in priſon, but ſuch ſpecial things ſhall not be intended by the Law, but ſhall be ſhewed. As to the matter, there are principally two things, upon which Arguments may be made, *viz.* Maxims, and Reaſons, the Mother of all Laws; and the Maxims are the Foundations of the Law, and Concluſions of Reaſon, and therefore are holden as firm Principles, and Authorities of themſelves. One is, a Remainder

der ſhal not be limitted, except it be to a perſon capable at the time, as to a *Monk* profeſt, which afterwards is deraigned, & after this, the Tenant for life dies, the Leſſee for life ſhal not have the remainder because he was not a perſon able at the time of the remainder limited to take it; ſo a remainder to him That the particular Tenants ſhall name, and after he nameth one, yet the Remainder is void for the cauſe aforeſaid. But 32. *H.* 6. if the remainder is limited to the right Heirs of *Jo. S.* who is living, and he die before the particular Tenant, it good, becauſe *I. S.* ſhall be intended then dead alſo becauſe by all preſumption, and intendment of Law, *I. S.* may have an Heir, which the Law will appoint in deſpight, and ſo will be certain; and therefore the Remainder good, but ſhall not be good where it ſtands indifferent, if he to whom the Remainder is limited, will be a perſon able, or not. Another Maxim is, That a Remainder may paſs out of the Leſſor at the time of the Livery; for that *Richel* ſaith in *Litl.* 162. the Remainder is void for this cauſe amongſt others: ſo here it paſſeth not by the firſt Livery, becauſe a Condition precedes the Commencement of the Remainder, *viz.* if *W.* die, living the Husband and Wife, then the remainder to the Defendant, and ſo paſſeth not at the firſt Livery; and therefore void.

Brook, Serjeant to the contrary. As to the uncertainty of the time of the Entry, the Bar ſhall be intended the better for the Defendant, which is That he entred immediately, and the Bar ſufficeth, which is good to a Common intent. And therefore about 20. *E.* 3. it is holden, That if one plead in Bar, That one *I. S.* died ſeiſed, and *R. S.* entred as Son and Heir to him, whoſe Eſtate he hath, this ſhall make the Bar good; and yet it may be

that

hat he was not Heir, for it is not expreſly ſaid, That he is Son and Heir, but that he Entred as Son and Heir; and yet in as much as it is pleaded by way of Bar, the beſt ſhall be intended for the Defendant; ſo here. And he argued beſides, much in effect as *Cook* did.

Sanders, Serjeant for the Defendant. The Bar is good to a Common intent, and the beſt ſhall be intended for him which pleads it; for a Plea in Bar is alwaies made for two cauſes: The one to inforce the Plaintiff to make his replication. The other is to compel him to joyn Iſſue, which cannot be joyned upon the replication, as it may upon the Bar, and then the certainty ſhall be in it, and not of neceſſity in the Bar; and therefore the Bar good, if it be good to a Common intent. As in Aſſiſe, the Tenant pleads in Bar a diſcent to the Plaintiff, and to two others, and that he hath the ſtate of one, and it is a good Plea, becauſe it is intended rightfully, yet he may have it by Diſſeiſen, and then he is a Diſſeiſor to the Plaintiff alſo; for he cannot be a Diſſeiſor to one, except he be ſo to the other. So 27. aſſ. 31. in an Aſſiſe by the Heir, the Tenant ſaith, That the Father of the Plaintiff being Tenant by the courteſie, and now in life, Leaſed his ſtate to his Father, which died, and he is in as Son and Heir, Judgement if Aſſiſe, and held a good Bar; yet he doth not ſay, That he was the firſt which entred, and yet good. So 21. *H.* 6. 17. there *fol.* 26. as to the Remainder it ſhall be good, becauſe it is a principle, that it ſhall be taken moſt ſtrongly againſt him which made it; and therefore in 31. *H.* 8. If a man gives to a man, and to heirs, without [his] it is Fee; yet he giveth not 29.
Fee expreſly. So 18. *E.* 3. 28. after 170. A good Remainder by word, That after the Deceaſe of

Tenant

Tenant for Life, the Lands shall return to *A.* a
B. in Fee. So a Remainder to the right Heirs of
S. in Life passeth presently, and shall be in ab
ance rather than void; and that it shall be to t
benefit of the Lessee against his own Livery a
limitation, as alwaies the Law interprets wor
strongest against the Speakers, as in 40. *E.* 3. 5.
49. *E.* 3. 1. A Termor counts that he left this
good as he found it, and the Wind blew down
House, it is not waste, but Covenant lies, for
special Agreement alters the Law, and maketh
words to be taken more strongly against him.
the Law taketh the Acts aforesaid strongly agai
the Makers. And therefore if *I.* give to *B.* La
upon Condition, That if he Marry my Daugh
he shall have Fee; if he Marries her he shall h
Fee, for by the Livery it taketh Commencemen
and by the performance of the Condition, it take
perfection, and in the mean time it is ambiguo
So a Lease for years upon Condition, That
moneth after he shall have Fee, he shall have it a
the moneth accordingly, for the thing passes a
cording to the Covenant, most strong against
Donor. So a Lease to two upon Condition, T
if the one die within seven years, that then after
death of the other, it shall remain to a strang
good; and Privies and strangers are all one. 24.
32. he differs, because he hath an Estate first giv
to which the Condition may be annexed, and
very, and by imitation shall be taken strongest
gainst him which makes it. Three things one
have by Remainder. First, he shall have a Rema
der to vest; Secondly, a Possession in Law;
Thirdly, a Possession in Deed, & if he be capable
the time of the Possession in Law cast upon him
sufficeth (28. against it) as 17. *E.* 3. 29. and

E.

f. 3. 15. a gift to one and his first begotten Son, and he hath no Son then, but afterwards he hath, is a good Remainder to his Son. So 39. Assise *Pla.* 20. a gift to Husband and Wife, and to one Heir of his body, is a good Remainder; yet no Heir to the gift, if he be in being when the Possession in Law is cast upon him; but a Remainder limited upon contrariety, is not good (*fol.* 24.) according; but the other cause that *Litl.* assigns for that it vests not at the time of the Livery, is no cause, as is proved by the cases aforesaid, because after the Alienation and gift, it may not remain to another. And the other cause that *Litl.* alleadgeth is, because it vests not at the time of Livery, which is no cause. So a gift to *A.* and his Heirs so long as *B.* shall have Heirs of his body, Remainder to *C.* in Fee is void; for the contrariety, because a Remainder cannot depend upon a Fee determinable. So a Lease for life to *A.* upon Condition, That if *B.* pay 10 *l.* to the Lessor, that then immediately it shall remain to *B.* is void for the contrariety, because *A.* ought to have it during his life. But if it were to remain after the death of *A.* to *B.* then it were good, because no contrariety there; and here if *W.* dies, living the Husband and Wife, that then it shall remain to the Defendant, is not intendable immediately in their lives, but that it should remain when it ought to remain, *viz.* after their deaths, and then there is no contrariety, and therefore good. As to the Condition which is subsequent if he would dwell there, *&c.* because it hath two intendments; the one that he should inhabite there all the Term, and the other to some time during his life, shall be taken strictly, and the more strongly against the Lessor, *viz.* That he inhabites there at some times during his life which sufficeth, as the Feoffee upon 17.

Condition for to pay 10. l. to the Feoffor, and time is limited he hath during his life. So to se him in such an Office, and saith not how long hath, during his life.

Harris, Serjeant to the same purpose. And to the Exceptions he said, That a Condition subsequent, and which goeth in the Defeasance of Estate; as here he that claims the Estate shall shew it, but the other which will defeat the Est But where the Condition precedes the state, he shew who shall have it, because enabled thereu as if I grant a Rent Charge upon Condition, T he shall do such an Act, there the Grantee avow for the rent without shewing the thing d because it is a condition subsequent, and defeat Estate. But if I grant, That if he doth suc thing, that then he shall have the rent; he shall avow without performance shewed, because h enabled by this to the rent. 14. *H.* 8. *W* Grants his Term to one upon Condition, T he shall obtain the good will of the Lessor, and t shall have it; he shall not have it until he hath s ed the performance of the Condition, and h firms the remainder upon Condition to good.

Hales, Justice. If he would, *&c.* is a Co tion, and that the Plea is insufficient, because Defendant hath not averred his continual dence after the Remainder happened; for du the Term, shall be intended all the Terms shall be in reservation of rent or Covenant to pair a house during the Term, 27. *H.* 8. 19. *Audley*; so the Feoffees shall be intended all Feoffees, and if he hath a reasonable excuse, ought to shew it. *fo.* 272. *vide*. That he was 200. 31. distant at the time of the Survivor of the Hus

nd Wife, and entred ſo ſoon as he had notice, hich he ſhall ſhew in certain, that the Juſtice may ry it, as 22. *E.* 4. 27. Tenant for Life Leaſes or years, and dies; The Leſſor bringeth Treſ- oſs againſt the Leſſee, who ſaith, That in as ſhort ime as he could after that he had notice of the eath of the Tenant for Life, he chaſed his beaſts orth of the land; and ſaid alſo that the Treſpaſs as between the death of the Tenant for Life, and e chaſing out of the beaſts, and held no plea; for y the death of Tenant for Life, the Leaſe for ears was determined, and no man bound to give m notice; and there it is holden, that he ought ſay; That ſuch a day he chaſed out the beaſts, nd might ſhew that the Leſſor died in another ounty, and ſo he could not have ſo ſoon notice; nd this ſhall be tried by the Juſtice if the avoid- nce was in reaſonable time. So in this caſe the y of his Entry for the knowledge of the Jurors ght to be ſet forth; common intent is that which h more vehement preſumption and intendment n any other intent hath, as 3. *H.* 6. 3. before 26. lly adminiſtred all goods which were the Teſta- s the day of his death, good; yet might have goods re not the Teſtators, which are aſſets after the ebts paid; but the moſt common intendment is, at he had no other goods, except thoſe which re the Teſtators, but intendment indifferent the re ſtrong intendment the one way or the other, d therefore ought to be pleaded in Bar, as 13. *H.* 15. by *Willoughby*, the life of *ceſtui que vie* leaded in a Leaſe for another life which is in- rent if he be alive or not. So if he pleads a eaſe made after the Obligation, it is not d if he ſhews it not by expreſs words, that as delivered after; it ſhall be intended that it

was delivered when it bears Date. But on the o
ther part it shall be intended also, That the
ther would not bring an Action if it were deliv
ed after, and therefore shall be shewed wh
intendment stands indifferent; so here. A D
murrer all times after the Remainder happens
not, is incertain, and therefore because he hath
shewed this, the Plea is nought. As to the matte
Law, it seemeth to him that the remainder is go
for a man may pass the thing in question wh
where, and how he will if it be not against L
nor repugnant, as here the limitation, if the
mainder is not against Law; for the remain
need not pass forth of the Lessor, *fo.* 29. for u
the Agreement first had by Act made afterwa
Franck-Tenement, or remainder, may be trans
red and devested from one, & vested in another
a Lease for life, remainder for life upon condit
That it shall be void if he doth not such an act
remainder before the Condition broken is in
when broken it commeth to the Lessor. So a rem
Reversion passeth by Attornment, not by the G
presently. So 1 *H.* 7. 31. by *Brian*, a remainder to
K. when the Deed is inrolled, then it shall pass
relate to the Livery. So in the case of *Plessi*
6. *R.* 2. where the Condition was, That i
Lessor die within the Term, the Lessee shall h
for life, and there holden that his estate shall be
larged if the Lessor die. So Disseisen to the u
I. passeth not a Free hold of *I.* to *I.* without h
greement; so here. A remainder passeth when
died, not before, by force of the words annexed
the Livery. So by *Litl.* a confirmation to the H
band and Wife, Tenants for life, passes the
mainder to the Husband, yet it passeth not a
time of the first Estate, and the diversity where

upon Condition is appointed to privy, and where to a ſtranger is but a conceit which is worth nothing, (29. according 24. to the contrary,) and is privity becauſe it reſerveth out of both; ſo it ſhall bind him in remainder, and alſo he in remainder ſhall have waſte, and ſo is privy to the particular Eſtate, and the Leſſor alſo; and the words then which ſhall remain, ſhall not be intended preſently to deſtroy the particular Eſtate, but ſhall remain as a remainder ought to diveſt then, and is to be executed after their deaths; as if Donee in Tail doth ſuch an Act, then to remain to his right heirs, which veſts when the Act is done, and after the Tail ended, ſhall be executed, and not preſently upon the Act done to avoid the Tail; ſo here. There is not any repugnancie or prejudice to any; but a thing when it is done, made in prejudice of another, ſhall be voide; as a remainder that he ſhall have the land in the life of the particular Tenant. So 21. *E.* 4. 44. The King diſcharges an Abbot, That he ſhall not be a Collector, when any Titles ſhould be granted by the Clergy of *England*; and *Canterbury* Grants Tythes, provided that the Collector returned by the Biſhop, ſhall not be diſcharged by the King; and the Biſhop returns the Abbot Collector; there holden that the Grant by the Clergie in this point, *viz.* to charge perſons exempt, is void, becauſe it is in prejudice of others. And ſo the remainder here ſhall be void, rather then a ſtranger ſhall have prejudice by it; but for defaults in the pleading, the Plaintiff ought to recover. 32.

Hinde, Juſtice to the 3. exception; the death of the particular Tenant ſhall not be ſhewed, which is onely conveyance of the execution of the remainder, and is not Traverſable, nor Iſſuable.

To the first, and Second exceptions, he needs no
shew his continual residence after the Remainde
is fallen, nor the day of his entry, because it
a Condition subsequent, and goes in defease of h
Estate; and he which hath benefit by it, ought
shew it; as 29. *H.* 6. 22. the Grantee of an annu
ity *pro concilio impendendo*, shall have the Annui
without shewing that he hath given Councel, f
that the shewing of it is not beneficial to him, a
the denial of Councel defeats the Annuity; so h
agrees to the diversity in case of Annuity. 15.
7. 1. *bont. fol.* 25 by *Pollard* when one shall be pr
moted, and therefore the shewing hereof that wh
is surplusage, and the imperfectness of it shall n
make the Bar vitious; and the Remainder he
by him commenceth not upon Condition; but
is a limitation, and explanation from the time th
it first begun for nothing, or words makes a C
dition but such, which restrains the thing given;
If 1. Lease for life upon Condition, That if t
Lessee die, or maketh waste, and *I.* recover t
33 place wasted, or any parcel of it, That *I.* shall e
ter into all; for it is a Condition for that part
which no waste is done, because it restrains a
defeats that part. And if it be a Condition here
yet the Remainder thereupon is good, if it com
menced and vested at any time during the partic
lar Estates; (24, 29. 32, 34.) for when he ha
Fee-Simple, he may Condition with it as he ple
seth, if it be not against Law; as if *I.* Lease f
life upon Condition, That *I. S.* paies to me 20
that *I.* shall enter, then the Remainder is void, b
cause the entry avoids the first estate, and then
particular estate continues upon which a Remai
der may depend.

Brown, Justice to the same purpose. The ent

of the Defendant, shall be intended immediately; for this is the most common intent; and a Bar good to a common intent, shall be intended that he entred presently after his Title accrued, and to the matter in Law, hold that the remainder shall be good upon Condition.

Montague, Chief Justice to the same intent. The entry of the Defendant shall be intended presently; for this is the most common intent; and a Bar good to a common intent, is good; as 21. *E.* 4. 83. in Assize the Tenant pleads a discent to him as Son and Heir, and he entred, and it was held good; yet the Father of the Plaintiff might have abated, and died seised, and then the Plaintiff is in as Son and Heir, in which case the Tenant might not enter. But this is not intendable; but the most common intent is, That the Tenant entred immediatly after the death of of his Father. So 9. *E.* 4. 12. in Debt against five Executors, at the Distress, 3. makes Default, 2. appears and pleads Recovery against them two of 300. and that more they had not in their hands. Exception taken, That because by intent there should be five Executors, two might have abated the first suit, and so the Recovery not duly had, but holden good: because it may be that then they two onely administred, and then they did lie against them two onely; and the most common intent is, that it might be so rather than at first to lose advantage to have abated the Writ; and therefore the Plea in Bar was held good, and Execution duly had; and if it were otherwise, the Plaintiff ought to have shewed it. So 21. *E.* 4. 8. 1. *In formidon in discender*, The Tenant pleads the release of the Demandant without Warranty in Bar, yet might be made by him in the life time of the father, and then

it is no Bar; but it shall be intended to be ma
after the death of the Father, if the Demandant n
plies not to the contrary; but if he which ple
in Bar is bound at a time certain, he ought to she
the day of his Act certainly (24, 26, 27.) as t
day of entry for Mortmain, so that it may appe
to be within the year. So if one justifies for Co
mon between *Lammas* and *Candlemas*. So if o
justifies by Warrant, by Licence, by Authority
he alwaies ought to shew the time certain of his j
stification; so that pleading in abatement of t
Writ, or a plea after the last continuance, ought
plead certainly; and these are observed as princ
ples in our Law; but he which pleads in the Ne
34. gative ought not to plead certainly. If he wou
dwell, &c. It is like that it is not a Condition her
because it is not compulsive, so that he shall ha
prejudice if he doth not, but is a thing obligat
at the will of the Defendant, and then his entry
not material, but is at pleasure; and therefore t
not shewing thereof shall not make the Plea vic
ous. Admitting that it be a Condition, yet it
subsequent, and in Defeasance of his Estate. (30
And therefore shall not be shewed by him, but b
him which shall have benefit by the breaking of t
So if a Condition be enlarged, which may b
good, leaveth that out which is material; becau
it is Surplusage. Also it hath no Livery for
convey Title, nor hath it enabled him any wa
to take the benefit of the breach of the Conditi
if it were broken, because he hath Demurred g
nerally upon the Bar, in which the Defendant ha
not acknowledged any reversion. And so it ap
peareth not by the Record that he is other then
meer stranger. And by the Common Law n
man shall take benefit of a Condition, but such
on

one as is privy. And therefore 38. H. 8. 34. *Patentees* of the King (after 177.) Also if it be a Condition during the Term, it shall be intended all the Term; as a man bound to perform Covenants, is bound to perform all, and his Feoffees. (*fol.* 30.) Yet if he be sometimes absent, and his Family there, it is good, because the Law shall have a reasonable Construction in things alwaies. If he dies, then the Remainder is a Limitation, and appoyntment of the time when the remainder shall vest. But admitting that it be a Condition, yet a Remainder may depend upon a Condition, which every lawfull owner of the land may give to what person or persons, and in what manner, and at what time he pleaseth, if his gift be not against Law, or repugnant; as 10. *E.* 3. 39. A man makes to his Termor in surety of his Term, a Charter of Feoffment upon Condition, That if he be disturbed of any part of his Term, that then he shall have Fee; he was disturbed, and afterwards outed, and recovers in Assise, which proves that the Franck-Tenant passed upon condition express to the Livery; & be it mediate, or immediate, it stales not the Remainder, because his Livery shall be taken most strongly against him. So 27. H. 8. 24. Remainder to a stranger if the gift fail, for bearing of the standard. So in *Plessintons* case it is held, That the estate of Free-hold there could not Commence upon Condition: but the cause wherefore, was because he had not the Free-hold upon performance of the Condition, which was repugnancie. So a Remainder upon condition, contrary to the Law, or impossible, is not good; because a Condition unlawfull, or impossible, may not obtain the thing by doing of it. So if the Donee aliens, then it shall remain, is not good, because

cause repugnant; for when he hath alienated to o
it may not remain to another. Remainder ou
to have estate precedent; for that 9. H. 6.
Lease to a Monk, Remainder over void, bec
a Monk hath not capacity, and so the estate wh
precedes the Remainder, void. Remainder
35 ought to be of a thing in *esse* before; and there
a Grant of a rent out of land, remainder in F
void; because the rent was not in *esse* before; a
the remainder here passeth presently by the Li
ry upon possibility to be afterwards performed,
vests when *W.* dies, and in the mean time rests
abeyance; as 15. H. 7. 10. Fee Tail passeth
on possibility, That a Fem Covert, and a marr
man may inter marry, and in the mean time
Inheritance, *viz.* The Tail shall be in abeyan
but holden there, That they are seised in Tail p
sently, and concludes that the Remainder is goo
and the pleading also; and so the Plaintiff shall
Barred.

Plat, *against the Sheriffes of* London.

4 E. 6. In the Exchequ.

ONe *Goodlad* was in Execution *Ludgate* upon
recovery in Debt had against him by plai
in the *Guild-Hall* of *London*; and going with
Baston, (that is to say, a Servant of the Gaole
attending upon him into *Southwark*, in the Coun
of *Surrey*: and the Administrator of him wh
recovered, brings his Bill of Debt into the Exch
quer against the Sheriffs for the escape; and
judged that he should recover thereupon. But
exceptions were taken to the Bill, and the reaso
of the Judgement were,

1. Fo

1. For that the Action lyeth at the Common Law by 45. *E.* 3. 9. Debt against one *Abbot*, or *Prior*, and also for that, That he had not remedy against him which escaped; for by the escape he is discharged for ever against the party, and the Goaler also; and the Officer which suffers the escape, is charged contrary to 13. *H.* 7. 1. But the Action lay not by the Common Law, by 42. Ass. 11.

2. Admitting that it lay not by the Common Law, yet it lyeth by equity of the Statute of 1. *R.* 2. c. 12. which gives an Action against the Warden of the Fleet, or by the equity of the Statute of *Westm.* 2. c. 11. which gives an Action against the Gaoler which suffers an Accomptant for to escape.

3. The defendants have admitted the action good by their Demurrer.

4. That it is an escape, because he was out of the Jurisdiction and Authority of the Sheriffs, and that his Imprisonment is ended the last instant that he was in *London*, and his escape began the first instant that he came into *Southwark*; and so he was never in prison in *Southwark*, for he had no guard there.

The effect of every suit contains and implies in 36
it selfe 3. things. First, to shew the verity of the matter to the Judge thereof, which is the duty of the party. Secondly, to have judgement to recover, and execution thereupon; and this is the duty of the Judge. Thirdly, the making of execution for to take the Defendants body, and detain it in prison; and this is the duty of the Officer: and because he only hath offended, it is reason that he be punished, (that is,) That he answer the loss to the Plaintiff; for that he hath not any remedy against him

which

which escapes (nor the Gaoler never apprehend him; becaus a personal thing once suspended, extinguished.) and therefore if the Debtee m keth the Debtor, and another which surviveth Debtor, his Executors, yet the Debt is extin and the person of either of them discharged. The fore in respect that after the escape, the Plaint shall not have other execution, and so without remedie against the Defendant, in the first suit Common Law which is Common Reason, p vides, That the Plaintiff shall have an Action Debt against the Gaoler, in whose default the E ecution of the Plaintiff, or otherwise the Comm Law will be defective in this point. And therefo by 45. *E.* 3. 9. Abridged by *Fitz. h. in Title De* 130. which was before the Stat. of *R.* 2. where a *Pr or* dative and removeable, lets one in Execution his Guard for dammages recovered in his Co of Py-powder escape, *P. D.* bringeth an Act of Debt against him, and the *Abbot* his Soverelg the Writ shall abate; because he is named *Prio* whereas he is but one of the *Monks*, where he m not be Debitor. But it had been good, if the *Pri* had been omitted; and Debt is maintainable wit out contract between them, or privity, in possibi ty upon the escape. As 1. *H.* 7. 8. against t Clark of Hamper, upon a *Liberate* delivered him when the Comisor hath assets. Admitti that it lies not by the Common Law, yet it lies b equity of the Statute of *Westminster*, the 2. *ch.* 1 which giveth in Action against the Gaoler whic suffers an Accomptant to escape: and by the equi of the Statute of 1. *R.* 12. which gives an Acti against the Warden of the Fleet upon an escape for it shall extend to all other Gaolers by equity for although it be penal against the Warden, ye

it is benificial to many others; As 13. *E.* 1. *Circumspecte agatis* extends to all other Bishops as well as *Norwich*. So the Statute of 9. *E.* 3. 5. That the Executor which first cometh by distress, shall answer. 3. *H.* 6. 14. extends to an Administrator, and 9. *H.* 6. 19. Debt upon an escape of one in Execution, was maintainable against the Major of the *Staple*, who in excuse of himself, saith, That he was imprisoned by force of a plaint, and not in Execution; the words of *R.* 2. prohibites the Warden of the *Fleet* onely to suffer any in Execution to go out of Prison by Baston, Mainprise or Bail, and by equity all other Gaolers; yet these in *London* use it, and it is not an escape in them, because they may prescribe against the equity and words of Statutes, which is contrary to their Customs and Prescriptions; for that their Customs as Prescriptions, are confirmed by Statute; and contrary to the *Statute* of *Silva cedua*, and keeping of *Leets* at other times then the *Statute* appoints, and so let them in execution to go by Baston within their liberty. But others shall be bound by equity of the said *Statute*; and because this *Statute* extends to others by equity in this point of escape, it shall extend also to an Action to charge other Officers as to matters of escape. A prisoner marry the Warden of the *Fleet*, this is an escape, and he is at liberty, for he cannot be under his Wifes Custody. So if the Office discends to an Heir which is a prisoner, there he shall be adjudged at Liberty, although he lieth in fetters, because he cannot be his own keeper in prison.

Lairons case, 44. and *Kidgwaies* case, 3. 52. by which it appeareth that the cause here is to be understood of voluntary escapes in the Gaoler; for if the prisoner escape to his own wrong, the Plaintiff

tiff shall have a new *Capias ad satisfaciendum*, if the Writ of *Capias*, (upon which he is not imprisoned) be not returned, or shall be in Execution to the Plaintiff again if he be re-taken by the Sheriff, before an Action brought against him upon the escape.

Wimbish *against* Talbois.

4 E. 6. In the Common Pleas.

THe Husband makes a Feoffment in Fee, to the use of himself, and his Wife, in speci Tail, the Remainder to the Husband in gener Tail, the Remainder to him in Fee, 27. H. of Uses was made; the Husband and Wife entre the Husband dies, the Wife suffers a recovery b Confession the first day, which is not executed and the Issue in Tail enters for the forfeiture by the *Statute* of 11. *H.* 7. *c.* 10. and the opinion of the Court.

1. That the entry is lawfull, and this forfeit is within the words of the *Statute*, although the the wife had not any estate in the Land in use, yet shee had the use in the Land, which is all one; and this is an Hereditament which will make *Possessio fratris*, by 5. *E.* 4. and was appointed by the Act of the Husband, and was an inheritance and purchase in him, and so within the words of the first branch of the *Stat.* of 11. *H.* 7.

2. Admitting that it should be out of the words of the first branch, because it speaks of gifts to the Husband and wife by any seised to his use; and Feoffees are Donees by the *Stat.* of 27. *H.* 8. of Uses by 6 *E.* 6. *Formedon* 40.

3. Admitting that it be forth of the words of the first branch, yet it is within the equity, because it

a benificial law, and in advancement of Justice, and suppression of fraud.

4. That a remedy by Covin upon a false, or true cause, is within the *Statute*, although no execution be sued; for the Covin is a Condition in Law annexed to an estate, which Condition is broken, although that Execution is not sued; the *Statute* is general of Recoveries by Covin, and includes all recoveries, & this Condition annexed to the use, shall transfer to the possession by the *Stat.* of 27. H. 8.

5. That he which entred by such forfeiture, shall be seised in Tail or Fee, as shee should be, if the Wife were dead, and this in course of discent, and not purchase, (*paramount*, contrary to *Hales*) and that a Son born, may enter upon the Daughter which hath entred for such forfeiture; contrary of a purchase; and that the entry for the forfeiture, is maintainable presently in the life of the Wife, which maketh it; and he which enters may aver generally in pleading, That he is that person which ought to take benefit of the forfeiture; by all the Justices contrary to *Montague*.

Cook, Sergeant to the Defendant, which saith, That the Replication is not good, because it shews not how he is Heir in special (but hath averred, That he is the same person to which, *&c.* general abatement) for it is issuable, and when such *Statutes* gives entry generally to one, yet if he will take advantage of it, he shall shew how he is the same person, and shall not say generally that he is the same person; as upon 6. *R.* 2. *cap* 6. which will enter by assent to the Ravisher, 5. *E.* 4. 6. ought to shew how he is next Heir, yet the *Stat.* is general. so for prayee to be received upon default of Tenant for life, by *W.* 2. *cap.* 3. ought 43.

to

to shew how he came to the Reversion. So he who will Intitle himself upon 7. *E.* 1. for entry upon *Mortmain*, how he is Lord. As to the Obligation That because the Defendant in Bar in saying who heir he is, hath affirmed the Plaintiff to be heir, and therefore in the Replication hath conveyed himself to his entry as Heir special, and so the Replication ill, for default of certainty. Secondly, for the the Plaintiff hath not shewed that execution was had of the said recovery against the Defendant. Thirdly, Exception because he hath not averred the Covin specially; for otherwise it is not intendable in Recoveries, because they are always intended true, and upon good cause; and therefore the Wife at the Common Law, by default against her, and her husband, had not any other remedy then a Writ of Right before the *Statute* *W.* 2. *cap.* 3. which gives a *Cui in vita*: and before *W.* 2. *cap* 3. a faint Recovery against Tenant for life, bound him in Remainder, *Litl.* Rel. 112. because the Law presumes the Title and cause true. So a Recovery upon a faint Title by a man of Religion was out of the penalty of the *Statute* of *Religiosis*, untill *W.* 2. *cap.* 23. made Recovery without Title in such plight as a Feoffment in *Mortmain* was, for the truth supposed by the Law to be therein. So here the Recovery is intended to be true; and therefore the Plaintiff ought to shew matter (if there be any) to prove the contrary. As in 11. *H.* 4. 19. If the Tenant in *precipe* vouch one of the Demandants, he ought to shew cause; because otherwise the Law will presume that he hath not cause against right. So 3. 4. 4. Contrary entry by Title general, averment Covin by the Plaintiff in Dower, was not good. As to the matter in Law, it seemeth

44. Matter in Law.

that the case is clear out of the words and penalty of the *Statute* of 11. *H.* 7. *cap.* 30. For although 27. *H.* 8. hath executed the Possession to the use, yet this case remains here, so as if 27. *H.* 8. had never been made, and the Wife had continued Tenant in Tail in use, and out of the words of the first branch because he hath an Estate Tail in the use in the land, but hath not an Estate in the land in the use; and the *Statute* speaks of an Estate in the Land; and this Hereditament or use, which is the matter and substance; and the use it self, which is the confidence of the thing, differ. But one may not have the state in Land and use also, because suspended; yet two may, to the use of one of them; as Husband and Wife to the use of the Wife; and so it shall be intended here. Also the first branch speaks of lands, &c. of Inheritance or purchase of the Husband; but here the use is a new thing, which Commenceth now and was not a being before; and so is not the inheritance or purchase of the Husband; and therefore out of the *Statute*; as a Rent granted to one out of lands to the use of the Wife of the Grantor; or if the Husband gives a signiory in Tail to the Wife for her Jayncture, and the Tenancie Escheat, and the Wife suffer a faint Recovery, this is forth of the *Statute*. So the Husband makes a Feoffment upon condition to re-enteoffee him, and his Wife in Tail; the Wife suffers a faint Recovery; this is out of the *Statute*; because the Feoffment of the land from the Possession of the Husband, and not her purchase, and not the purchase of the Husband, or his Inheritance; for the Condition, which is the cause of the gift, is a new thing, is not within the second branch; because the Wife had

nothing here of the gift of any of the Ancestors
the husband. Nor the third branch, because the
had not possession by the *Statute*; nor by the
offices to the use of him in Reversion, but
in Reversion hath the present Title; and so
Statute shall be intended; and therefore he
enter presently. If Tenant for Life suffer a
Recovery; but 11. *H.* 7. saith Enjoy accor
to their Title, intends that he shall not Enter
after the death of his Ancestor; because he had
Title in the life of his Ancestor. And there
when the Wife assents to the Ravisher, 6. *R.* 2.
title of entry; saying *habent titulum intrandi*, &c.
tends that he shall not have it in the life of the
cestor. And if the makers of the *Statute* of
7. had intended that the issue in Tail should
entred presently, they would have given to
Title by such like words as the *Statute* of 6.
hath; but the end of the clause which saith,
they shall enjoy according to their Title, exp
that they intented not so. For which causes
probable that the Defendant is out of the p
of the *Statute*, and that the Plaintiff might no
ter, and so shall be Barred.

Whiddon, Serjeant for the Plaintiff. Be
the Defendant hath said whole Heir he is,
46. shall be taken that he is Heir special; for a
which hath two intendments, shall be taken
strongly against him which pleads it; as 3. *H.*
in Trespass, Release generally is no Plea,
cause it may be taken to be delivered befor
Trespass, or after. So 3. *H.* 7. 8. and 9. an
H. 8. Entry to avoid *warranty Collaterall*, p
ed in Bar, is no Plea; because it may be int
after the discent; for he may enter in the li

Anceſtor, or aſore. Alſo the Plaintiff need not ſhew how he is Heir, becauſe he was once ſeiſed by entry. But if he had brought a formedon upon the Eſtate Tail, he ſhould; becauſe by way of Demand; as 6. E. 4. 1. Executor brought Treſpaſs for a thing taken out of his Poſſeſſion, he ſhall not ſhew his Teſtament; but if he Demands a thing whereof he had not ever poſſeſſion; he ſhall. It is not needfull to ſhew Covin certainly, for it is a ſecret thing; and the Law doth not enforce one to ſhew a thing, when by intendment of Law it lieth not in his Conuſance; as 20. H. 7. 7. A woman ſhall have Dower of a Rent Charge without ſhewing the Deed of the Grant; becauſe it belongeth not to her. So the Lord ſhall have Covin generally for the Ward, where his Tenant dies, and re-taketh for life, the Remaindet to his Heir, being it lieth ſecretly in the breaſt, as Action lieth; for that he may juſtifie imprisonment for ſuſpicion of Felony, without ſhewing of the cauſe of his ſuſpicion. So 33. H. 6. 5. In Treſpaſs, a man buys in a Market Overt; the Plaintiff ſaid, That the ſaid buying was by Covin between the Defendant and a ſtranger generally, without ſhewing any thing ſpeciall of the Covin; and the Plea there admitted good. So in Praecipe againſt the Lord of ancient Demeſne, and Tenant; the Lord ſhall ſhew that he is Lord; and this Action is brought againſt him by Covin generally. So 9. E. 6. 41. He which alledgeth Covin, ought to ſhew cauſe of the Covin; and the cauſe is, for that the Recovery, or Title is tryed by Verdict; becauſe to ſay that it was by Covin, ſhall not be intended true againſt a Verdict. But Covin generally may be averred, a-

gainst a Recovery not gainsaying or default;
cause this is cause of the Judgement, and no
all. Wherefore in this case a man shall aver
this was by Covin generally. And as to that
hath been said, That execution ought to be sh
of the Recovery; that needs not: For the *St*
speaketh only of the Recovery, and without
cution, it shall be a Recovery, as a Fine is wi
Attornment; for the *habere facias seisinam*,
cites *cum A recuperavit seisinam suam* &c. be
the Husband raised the use. First it is his purc
and so within the words of the *Statute*; a
not, yet it shall be within the equity; and neve
less it is penal.

47. *Sanders*, for the Defendant. The *Statute*
is penal; because it goeth in avoidance of Es
and abridges power; and therefore not equi
And for this *Statute* of *W.* 2. *cap.* 14. before *Sc*
expectet emptor for Warranty; because he vo
an Infant; and yet it is adjudged 18. *E.* 4. 1
he maketh a Feoffment over, this Feoffee
vouch; because penall against one, shall not e
to another. So by 32. *H.* 8. *cap.* 33. The
seised of a disseisor without peaceable possessio
fore; for five years shall not take away the
of the disseisee; yet if one Abator die seised
in five years, this discent shall take away the
try. And so if Tenant for life be disseised,
the disseisor die within five years, and the Te
for Life dieth, he in Reversion or Remainder
not Enter; because he was no Disseisor to th
and to the discent, they had no Title to Enter,
the Tenant for Life, and taken strictly; bec
it abridgeth the Liberty given by the Comm
Law. By inheritance is understood Land by

cent, as it is proved by a case in 7. *H.* 4. 5. and a *cui in vita* abated, because it was *quam clamat esse ius & Hereditatem suam*; whereas it was his own purchase. And by 4. *H.* 5. *cap.* 3. which speaketh of Lands by purchase, or by discent, and the disjunctive prove the difference between the words. Purchase intends Land by gift or purchase, which is by Title. Disseisen is not purchase, because without Title. Now because the Plaintiff hath in the Replication said, That the Grandfather of the Defendant was seised in Fee; for to prove the Defendant to be within the first Branch; the Plaintiff ought to shew here how the Husband of the Defendant came to the Possession; for the manner of coming to the Land is Issuable, because it may be by Discent, Purchase, or Disseisen. And a Joincture made by a Disseisor to his wife, is out of the *Statute*; Recovery without Execution is not a discontinuance. 49.

Harris, Serjeant argues to the same intent; And he taketh also, that Covin cannot be where the Title is good, except that wrong be done by him which hath the Title; and this ought to be shewed; for here in respect that the Title is confessed to be good in this, That it is not traversed, nor confessed and avoided; this Recovery may not be averred to be by Covin; for this averment is repugnant in it self, and it cannot stand together to say that she did right by Covin. And as to the *Statute* he taketh the case here to be out of the words of the *Statute*. And note thou that he argued to all the other points moved to the same purpose that they were argued before.

Molineux, Justice. It is a vain thing to aver this specially, which is apparant, as the Covin; and

therefore when the Tenant infeoffes his
within age by Collusion, the Lord shall seise
for a Ward, without shewing this Collusion spec
ly. So if the Husband will confess an Action,
Wife shall have Dower by the Common La
proved by recital *w.* 2. *cap.* 4. For it is intende
by the Law to be Covin apparant; but it
doubted if the Recovery had been by Default;
here the Action had been tryed by the Verdict
12. men, the cause of the Covin ought to
been shewed, because the Law giveth credence to
As 5. *H.* 7. 20 Upon an *Attaint* no *Supersed*
shall be granted, because the Law presumes
Verdict to be true, untill the Reversal be
upon Error, in Deed or Record; so that the L
hath an indifferent judgement of it, *viz.* t
true or false. And so the Covin averred in th
voidance of the trial by Verdict shall be shew
certainly for the credence given to the Verd
Also Covin upon a good Title is prohibited;
cause the *Statute* of 11. *H.* 7. is generall. An
Covin generally averred here, without falsifyi
the Title, is good; as 4. *H.* 7. *cap.* 20. saith,
if a Recovery be pleaded in Bar of a popular A
on, the Plaintiff may aver it was by Covin
rally by the Warrant of the *Statute*. As to th
cond exception, the *Stat.* expounds it self to b
tended of a Recovery without execution. Every
simple is an inheritance, and then she had an
the inheritance of her Husband; and held th
Wife held the inheritance of her Husband, (th
to say) his Land in use joyntly with her Husb
and so within the words of the *Statute*, and i
it shall be within the equity and intent of the
tute; and he took without question, that th

Tail might enter presently, and out the Wife which is Defendant, and so hold the Plaintiff should recover.

Rules, Justice to the same intent. And first to the Covin, the Replication is good without shewing cause of it. And the *Statute* is for frail, inconstant women, and will not make them Judges, if the Title of Action be good or not. 18. *R. 2. cap.* 7. gives receipt to him in Reversion; where the Tenant for Life is impleaded by Covin of the defendants, that the Tenements shall be recovered, and he in Reversion, because it speaks generally of Covin. 2. *H.* 6. 14. and 11. *H.* 4. 3. For this cause there it sufficeth to say, That Tenant for Life pleaded faintly, and pray to be received without shewing cause; otherwise it is of Covin at the Common Law; and 11. *H.* 7. would have ruled the pain to fained recoveries expresly, if it had intended so much. And the *Statute* prohibits the Covin onely, be the Title good or faint; for in Recoverie by Covin, the issue in Tail may issue before Warranty made 20. years after the Disseisen; yet it commenceth by Disseisen, by the Covin. As if the Father Disseiseth the Son, to the intent to make a Feoffment with Warranty to Bar the Wife, Recovers against one which outs the Tenant by Covin; yet she had not good Title of Entry, is a Disseiseress; and Covin is apparent here, because he never took view, voucher, essoin, or other delays which he might. The *Statute* saith, That the Recovery shall be void, whereby it is not intended that it shall be executed, and shall not be intended to be by Disseisen without shewing.

The words of 11. *H.* 7. explain the intent, That 53.
Wives who have Lands in use, or use in Lands,

are within the *Statute*. Recovery against Te
in Tail, was good onely for his life before
Stat. and therefore compriſes uſe here, becauſe
Stat ſhall not be made in vain; for Tail in uſe
do as great prejudice, as Tail in poſſeſſion,
ſo the intent ſhall aid the obſcurity of the word
Conſtruction of words; but if it be not within
words, yet it ſhall be taken by equity; becauſe
reſtrains Liberty that the Common Law gave
the prejudice of another, as here of Tenant in T
to bind their iſſues by recovery or Warranty.
Marlebridge, cap. 6. ſpeaks of a Leaſe for years
to defraud the Lord of Ward; yet if it were
Life, or in Tail, taken by equity. So *W.* 2. *ca*
ſpeaks of 3 gifts in Tail; yet 4 *H.* 5. 6. and
H. 6 74. compriſe by equity all manner of int
becauſe it reſtrains liberty of breaking the int
on of the Donor, ſuffer by the Common Law.
W. 2. *cap.* 3. gives receipt to the Reverſioner b
quity to the Remainder; for the Common L
which may not ſuffer him to be received, ſuffe
wrong, and this *Statute* remedies it. So 13. *E*
cap. 17. gives receipt for faint pleading by equ
receipt by equity ſhall be for faint defending,
an Adminiſtrator ſhall have account by equity
54. the *Statute*, where it is given to Executors *ex*
So 1. *H.* 7. 3. gives an Action of Forgery of
Deeds, by which the Title and Poſſeſſion of
ther are diſturbed in the Copulative by equity,
the Title onely be diſturbed; and therefor
diſſeiſee which hath not but onely a right, ſhall
an Action in 4. *H.* 6. 26. becauſe where the Law
fective ſuffers a thing which is a wrong to ano
and a *Statute* redreſſeth it, there things in the
miſchief ſhall be taken by equity, in the like

view. So here because it is made in avoidance of Covin, therefore it is beneficial to the Common-wealth.

Brown, Justice, argued to the contrary for 2. causes in the Pleading. The one was for that the cause of the Covin was not shewed; for howbeit that the *Statute* speaks generally of Covin, yet it refers the pleading of this to the Common Law; and therefore because the cause of Covin was not shewed, the replication was nought. The other cause was, for that the Plaintiffs have not shewed how the Wife Plaintiff was Heir, and therefore may not be seised in Tail, as it was pleaded. And as to the execution, he held that it was not necessary to be shewed. And as to the matter in Law, he held the case here within the words of the *Statute*; and if it were not, yet he held them within the equity; for that the *Statute* was made in avoidance of Covin, which is to be abhorred; and therefore the *Statute* is beneficial to the Common-wealth; But for the said defaults in the replication, he held that the Plaintiffs should not recover.

Montague, Chief Justice. Title amends not Covin, for it may be upon a good Title; and therefore the books are, If a Wife recover Dower against *A.* who by Covin enters, and outs the Tenant, as in 15. *E.* 4. 4. yet she is a Disseisoress; and by 8. *H.* 4. 6. where the issue in Tail recovers against *A.* who by Covin Disseise the Discontinuee; yet 18. *H.* 8. 5. is not remitted, although his Title good, but is a Disseisor by reason of the Covin. The Title of a man shall not be tryed between strangers, where he which hath the Title is not party, nor shew Covin, because it

is

is a thing secretly determined to the prejudice of another; as Joynt-enancie on part of the Plaintiff; the Defendant which pleads this, shall not shew of whose Feoffment; for that, that he may have knowledge of it by presumption of Law as his own part here. *H.* 21. *E.* 4. 7 8. and 19. *H.* 6. So 19. *H.* 7. he which pleads a Deed which belongeth not to him, shall not be enforced to shew it: a man may aver Covin generally, where an ayment is given by *Statute*, or Common Law; the *Statute* of 13. *R.* 2. 18 giveth receipt for faint plea-der, and may alleadge it generally when he prays to be received. So a Termor for years by the *Statute* of *Glouceſter* ſhall be received, and aver Covin generally; and faint pleading, and Covin is all one. So 8. *H.* 6. 7. In Aſſiſe the Tenant makes default, one ſhall anſwer for him as Baily, he appears and diſallows him, and ſaith, That he will make default; the Bailiffs comes and Demands Conuſance of this default made by Covin for to take away their Conuſance generally, and holden good. So 10. *H.* 6. 15. In Formedon one Demandant agrees with the Tenant in Challenge which he made to a Juror; the other Demandant avers the Challenge to be made by Covin generally, and good. So if one pleads Impriſonment in excuſe of his default, or ſale in a Market overt; the other avers That it is by Covin generally; or if he pleads a Feoffment, the other avers, That it was by Champerty generally, and ſo may aver Covin given by the *Statute* or Common Law generally, where the cauſe of it may not be ſpecial: if it may be ſpecial otherwiſe, it is 7. *H.* 4. 15. *in ſcire facias*, the Wife received, pleads a recovery by a ſtranger, upon a not denial, and execution againſt him; it is

55.

but

the acknowledgement of the Tenant, and his own Act, and so Covenous. Faint recovery against Tenant in Tail, which dies before execution, the issue is remitted, and the Recovery not execution against him, and so is defeasable; yet the Covin in the Recovery, which is as a Condition, is cause of the forfeiture of the State; as a feoffment upon Condition, not to infeoffe *I.* alien that he within age infeoffes *I.* and so the State is defeasable, yet he hath broken the Condition.

And as to the other exception taken, for that it was not shewed certainly how he was Heir. *Mon.* 56.
ague held the Replication nought; for Replications, Titles, Pleas in abatement of Writs, and Replies, ought to comprehend certainty; the Replication forceth the party to issue, and therefore shall be certain, because the Court, nor the Jury may not be inveigled, or troubled for the uncertainty of the Replication, which maketh the issue, ordained and provided that they should be certain. But a Bar which is certain to a common intent, is good; for a man shall plead in Bar an Estate, without shewing how, it is not good; as it is holden 2. E. 4. 26. and every Replication ought to shew contrary matter to the Bar, and then ought to take Traverse, or confesse, and avoid the Bar. And here the Bar is good, and the Replication contains a misbehavior of the Wife of the Defendant, by which here Estate is void, and then the Plaintiff ought to make him able for to take benefit of the misbehavior of the Defendant: and here the Heir pleads this ability certainly, the Bar which is plainly confessed, is not plainly avoided; for it appeareth not here how the Plaintiff is cosen to G.

T. and

T. & pretextu quorum premissoy, refers to him who is said before, onely as it is expounded 7. *H.* 51. in a Bill of Debt against the Warden of the *Fleet*. 4. *H.* 7. 13. where one binds himselfe, That he will not claim, nor enter into the said land, &c. bar, that he entred not, nor claimed; the Plaintiff replies that he claims, he ought to say how, *viz.* That he came to the Land, and claimed, and entred. So in 5. *E.* 4 6. in Replication the Plaintiff ought to shew how he is next of bloud to the Woman ravished, with consent to the ravishment. So in *Mortmain*, how he is L^d. So for receipt; how he came to the reversion by special conveyance to the thing which the *Statutes* give by general words, as he. Titles alwaies ought to be certain, because that makes Title, is by this an Actor, and an Act ought to plead certainly; by *Hales fol.* 51. *b.* If Wife which hath a Joynture by her Husband, suffers a faint recovery, contrary to 11. *H.* 7. if the Daughter enter, the Son born after shall not enter her during the life of the Wife. By *Montogue*, he may enter presently, (and save) because the *Statute* saith, he shall enjoy it according to his Title therein; and the Title is Tail, which is devested to the Son, and after *f.* 113. But the Daughter because *prima de sanguine* entring, because the Wife assents to the Ravisher, shall hold against the Son born afterwards, and there it is Fee-simple. So 5. *E.* 4 6. So 9 *H.* 7. 25. the Daughter shall hold the Remainder appointed to the right Heirs, against a Son born afterwards, because it is vested in the Daughter as a purchaser, because it is Fee-simple, to which the Son afterwards born hath not right: for the Land was never in any of his Ancestors before, *Et possessio fratris de feo simplici*

simplicis facit, &c. of Fee-Tail not, but it discends to the youngest Son of the half bloud. So a Bastard eign abate in Fee simple Land, and dies without interruption, and his issue enter, he shall hold against the *Mulier puisne* 39. *E.* 3. 38. Of Land entailed it is otherwise; so it is a great difference between Fee-simple, and Fee-Tail; and according to the Proverb, *One shall beat the Bush, and another shall have the Bird.* As 9. *H.* 7. 24. and 25. A man hath Lands by the Mother, and alens upon Condition, and dies without issue; the Heir of the part of the Father enters for the Condition broken, the Heir on the part of the Mother ousts him. 14. *H.* 8. 18. by *Portman*; if a Remainder in Tail be once executed, the issue in fortunedon shall declare upon the Gift immediately, for all passes at one time, and upon one Livery. But in 20. *Ass. Pl. ultima*, it was shewed of a Reversion, after Seisen, or making Title by grant of the Reversion, he which makes Title, is alwaies Actor, and ought to plead certainly. So 2. *H.* 6. 4. A *Patentee* sheweth his Letters *Patents*; if he maketh Title by them. Words alwaies if they are ambiguous and obscure in *Statutes*, have been expounded according to the intent of the makers; as *W.* 2. *cap.* 3. speaks when a man *amiserit per defaltam* is expounded, when the Husband and Wife lose by default; because the Law alwaies was, that the Wife may enter, if the Husband alone lose by default. So *W.* 2. *cap.* 1. *Et si finis super hujusmodi tenementa imposterum levetur, ipse in re sit nullus.* The Words seem to make a Fine void, and yet it is not void; but is a discontinuance, and void as to bar the right of Tail. So the Statute of *Gloucester*, *cap.* 3. saith, Whereof no

Fine

fine is levied, intends by husband and Wife; they may well levy, the marriages of Women their Estates, and advancement, by this are gr
58. ly favoured in our Law, for 14. H. 8. 7. Wife shall recover her Land given *causâ matrim prælocuti*, if the Feoffee will not marry her. So have all Free-hold after Divorce. So a Wife have a *Cui ante divortium*, to recover the land by the Husband and Wife by default before Divorce. So 21. H. 7. intends to punish wom if they will recompence this favor of the Law wrong to the disinherison of Heirs; here the W hath an Estate in the use, and by his inherit ment, and the Land; and Use also is the inh tance of the Husband, and therefore within words of the *Statute*; because an Use is an He ditament. For 3. E. 4. 7. *possessio fratris* of an good, for the Sister also if she hath the value 40. s. in Use. 15. H. 7. 13. 5. E. 4 7. and *Litt.* 108. he shall be sworn in Assizes by the C mon Law, and *Statute* of Pernors of Profits, other *Statutes* have admitted an Use, for an He ditament, and the Land and use also, is the inh ritance of the Husband; for an inheritance such an Estate as the Heir may inherit, as he here; and every Fee and Tail by purchase or cent, is inheritance, by *Littleton*, and *Britton* c tains many errors. As to the Case of *cui in vi* in 7. H. 4. before *fol.* 47. by those of the Chance and also by the Register Original 132. is the one the other *quam clamat esse jus & hereditas*, &c. T Feoffees here were seised to the use of the husba and every of them hath an entire Use; for betwe Husband and Wife are no moieties, and after execution of the possession to the Use: By 27.
59.

6. The Parliament made the Conveyance of the Land from one to another; and the Feoffees are Donors; for when a Gift is made by Parliament, every one by it is privy, and assentes to it; yet the thing shall pass from him which hath most right, and most Authority to give it. As in 22. *H.* 7. 32. He to whose Use, and the Feoffee joyn in a Feoffment, it shall be said the Feoffment of the Feoffee; for they have most Authority for to give this. So Tenant for Life, and he in a Reversion joyns in a Feoffment; it shall be adjudged the Livery of the Tenant for Life. So if one seised in Fee, and another which hath nothing joyns in a Feoffment, it shall be said the Feoffment of him which hath right; and the confirmation of the other. So here it shall be said the Gift by Parliament of the Feoffees, and the assent and confirmation of all others. For if any other shall be adjudged the Donor, the Parliament should do wrong to the Feoffees in taking the thing from them. And an Act of Parliament will not prejudice any man, as 19. *H.* 6. 61. the *Rector* of *Edington* had an exemption from *Tythes* by the Kings Grant, he afterwards agrees to the Act which granted *Tythes* to the King, and so was one of the Grantors, yet shall not take benefit by this, but shall be discharged. For the Common Law saith, *That none shall be damnified by such general Act made by the Parliament*; and therefore *vv.* 2. *cap.* 1. Gifts upon Condition shall not take away right *Patent* in *London*; but that remains to this day with protestation to sue in the nature of a Formedon in Discender, if it be out of the words, yet it shall be taken by equity, although it be penal to some man; for here it restrains the Liberty of Tenant in Tail, be-

cause

cause it was for to redress false Covin, for to ... vance right and justice and benificial to the ... publick, As *W.* 2. *cap.* 3. gives a *cui in vita* ... a recovery by default, which was a wrong to ... Wife, and therefore gave *Cui ante Divortium* ... equity. So *Marlebridge*, *cap.* 6. *De primogen.* ... and of Feoffment; yet if the first Son dies, ... he infeoffees the second Son, or Levy a Fine, ... shall be taken by equity; because it redresses C... vin, which the Law abhors. So 1. *H.* 7. *cap.* ... gives a Formedon in Remainder against Per... of Profits, and 19. *H.* 7. 31. and after 178. ... *facias* for to execute a Remainder against the ... ker of the Profits, shall be maintainable by eq... No judgement was ever given in this case for ... default, *viz.* because he had not shewed certa... ly how he was Heir, and in special, for that it wa... suable, and Title given is certain.

Note, that all the Justices held the case here w... in the words of the Statute of 11. *H.* 7. And ... were not within the words, that yet it was wi... the equity of the Statute. And they held also, ... the Heir may enter immediately, (that is to sa... in the life of Tenant in Tail; but no judgem... was given.

Dive *against* Maningham.

M. 4 E. 6. In the Common Pleas in debt.

ONe was in prison in execution upon a Rec... nisance of Debt, taken according to the S... tute of 23. *H.* 8. *cap.* 6. and the Defendant b... a stranger made an Obligation to the Sheriff, ... dorced with Condition, That the pris... should save him from dammage against the K...

nd the Conuſee ; and alſo that he ſhould be al-
ways at his commandment as a true priſoner to ap-
pear before the juſtices and the King at *Weſtminſter*,
or elſewhere, within this Realm. And it was
adjudged a void Obligation by the *Statute* of 23.
H.6.c. 10.

1. For that the priſoner was not bailable, but ex-
cepted by the *Statute* which in this point is not, but
in affirmance of the Common Law.

2. For that, That the third branch of the *Statute*
which maketh all Obligations void, taken for any
the cauſes aboveſaid againſt the form there expreſ-
ſed, extends as well to the ſecond branch, in which
the exception is, as to the firſt ; for the generalty
aboveſaid, and alſo by the intent of the *Statute*, to
oppreſs the extortion of Sheriffs in this be-
half.

3. Although it ſhall not be ſo, yet he taketh
the Obligation *colore officii*, as Sheriff of his priſo-
ner ; and ſo within the *Statute*.

4. No day or place of appearance is limited in
the Condition ; ſo the form appointed by the *Stat.*
not obſerved.

5. Other things are mixt in the Condition,
with the apparance, as that he ſhall ſave harmleſs ;
and this ſhall be intended there for all things, and
at all times.

6. He had but one ſurety, and the *Statute* ſpeaks
of ſurety of ſufficient perſons, in the plural number.
Montague fol. 63.

7. The Obligation here is void by courſe of
the Common Law, for that the Condition is
againſt the Law, for the party is not bailable.
H. 4. 9.

The *Extent* ought to precede the *Liberate*, here

are both in one Writ, yet in nature they are sev
but the Writ remains good for the extent,
the other is surplusage. 7. *H.* 4. 44. for Toll
paid, the Writ was *Tolloneum asportavit, &*
solvere recusavit asportavit, is void, because
plusage, and it abates not, because he refuse
pay, for that is sufficient, and be the Writ good
bad in Law, it shall stand in force until it be
versed by Error; because an ancient Record. 3
6. 1. the Sheriff took a single Obligation for
one to Mainprise, which is not Mainpernable
was void, because he took *colore officii*, whi
taken alwaies in ill part, and implies that the
is done by pretence of Office, but not yet du
and their office is but a vail and shadow to fa
Virtute officii, or *Ratione officii* taken in good
because it is alwaies where the Office is just,
causeth the thing, & it is pursuant to the office.
ligation is void where the condition is contra
Law; as to be saved harmless if he kils a
or doth commit trespass; so here the Obli
is void by the Common Law, because it wa
save the Sheriff harmless for wrong done ag
the Law, as is the letting the Prisoner at free
he being one which is not Bailable. So 2. *H.*
A Baily by *withernam* takes the Beasts of the
fendant, and afterwards re-delivers them to
Defendant, upon Obligation given to him b
Defendant, for the saving of him harmless, w
fore holden void; because it was to aid the
for this wrong in the re-delivery of the beasts t
party, for he ought to have detained them u
&c.

And afterward *Mollineux*, *Hales*, and
Justices, argued to the same purpose.

Montague, Cheif Juſtice. It is likely to me that the Plaintiff ſhall be barred; for an Act which is general in particularity, or particular in a generality, which is all one, as in 13. *E.* 4. 8. That all Corporations, and Licences made by *H.*6. ſhall be void. So that all Biſhops or Juſtices ſhall do ſuch an Act ſhall be pleaded; but a general Act which extends to every man, not; but the Juſtices ought to take Conuſance thereof; but if this Act hath ſeveral branches concerning ſeveral matters (yet contained in one Chapter) there he needs not recite all; but this onely which concerns him, and maketh for his purpoſe: for every branch is a ſeveral Act by it ſelf. But a Record ſhall not be pleaded (*inter alia*,) for it is intire upon one Original, and one Judgement upon it, but ought to read certainly all the Record when it is pleaded in Bar; becauſe the Record is the matter of ſubſtance, and the effect of the Bar, which ought to be plain and perfect when the Record is but conveyance and induction to the Bar or Action, it is ſufficient to recite this, which is the cauſe of the Action, as 34. *H.* 6. 48. A Tenant by *Elegit* takes avowry in *Replegiare*, for that he had execution as Tenant by *Elegit*, and made a Leaſe reſerving Rent, for which being arear, he avowed needed not ſhew the Record, becauſe the Leaſe only is traverſable, and is the effect of the Avowry and the execution by *Elegit*, is the Record from which it iſſues, which is nothing but conveyance to the effect; and therefore it ſufficeth to begin at the execution upon Damages recovered without pleading how he brought his firſt Action, and what anſwer the Defendant made, or ſuch like. So in 19. *H.* 6. 29. a Bill of Deceit againſt an At-

torney, for imbeſſeling of a *Habeas Corpora* up
Formedon between the Plaintiff and another,
den good, whithout ſhewing the Original and
tainty of the Land, and all the Record in cer
b. cauſe the Record is but a conveyance to the
of Deceit; and therefore for this cauſe canno
60. gainſaid; as to ſay *Nultiel Record*. But wh
Record is pleaded in Bar, all ſhall be ſhewed
tainly; and is Traverſable there, in Concluſio
general Demurrer (as *petit judicium*) if the P
tiff ſhall maintain the Action, one ſhall hav
vantage of all defaults, and of every thing m
oned in the Record, and of every point tha
Law gives him. In Concluſion ſpeciall, of de
onely alleadged in certain, as here, *petit judi*
if the Plaintiff ſhall maintain the action there
be void; for another cauſe then this which is
tioned, he ſhall not have benefit of this: of a
void *ab initio*, as the Obligation here, be
void by *Statute*; ſo in avoidance of a Deed,
he was not a man lettered, and that it was re
him in another form. So 14. *H.* 8. 28. be
delivered as an Eſcrow upon Condition, the
cluſion ſhall be, ſo not his Deed, becauſe the
ter proves that it was never his Deed of a
voidable, where it was void after; becauſe
was a Deed; the Concluſion ſhall be Judge
if Action; becauſe the duty is now extinct,
H. 7. 15. by releaſe. 35. *H.* 6. 18. for nonage
4. 5. by dures. When the Concluſion is n
and the matter in Law good. *Officium Judi*
for to give Verdict againſt the Plaintiff, if
peareth that he had not cauſe of Action, b
that the Defendant hath loſt the advantage t
as it is here. So 7. *E.* 4. 31. Treſpaſs aga

and C. B. pleads not guilty. C. pleads the gift of B. found guilty, and found for C. no judgement for the Plaintiff. because found against him. So appeal of a woman for the death of her father 19. E. 3. 7. because she shall not have an appeal of the death of any man except her husband, or Trespass against the Lord by distress where nothing is in arrear; because the Statute is *Non ideo punietur dominus*, abate *ex officio*, although the Defendant accepts the Writ, good; for the Plaintiff shall be barred by the Court *ex officio*, and shall not have judgement, although the Defendant admits his Title; or by his Conclusion hath concluded himself of his advantage, if it appeareth that he had no Title.

1. The first branch is commanding and authorising the Sheriff to let to Bail, persons mainpernable by the Common Law, *viz.* persons taken by Writ, Bill, or Warrant upon an Action personall, or Indictment of Trespass; for it was (indifferent if they were guilty or not) made in affirmance of the Common Law.

2. The second Branch, *viz.* The exception was also made in the affirmance of the Common Law before; for such persons which were in by condemnation, execution, *Capias*, *ut legat.* &c. were not bailable before.

3. The third is onely the purview, which relates to the second branch as well as to the first; for before, refers to all this spoken of before, as well in thing excepted, as otherwise; as a Lease for years of a Mannor, except a Close, rendring Rent, the Lessee binds himself to perform all Covenants, Grants, and Agreements, expressed or recited in the Indenture, and after disturbs the Lessor of a

thing excepted, he hath forfeited the Obligati
becauſe it is an Agreement; for when he exce
the Cloſe, the other was contented with it, and
the Leſſor ſhould occupy it; and recited goes
the exception as to the reſt. 45. *E.* 3. 4. cont
ed, and recited, goes to every Covenant in the
denture. An Act done *Colore officii*, is extort
as if an Officer takes more for Fees then he ou
And an Obligation taken of a priſoner for m
and drink, is void, becauſe it is *Colore offi*
for he nor the Plaintiff are not bound to give
ſuſtenance: as he which diſtrains, is not boun
give, although he be in for Felony; becauſe 7.
4. 47. his goods are his untill he be attainted by
Common Law; which is confirmed by 1. *R.* 3.
Raſtal Forfeiture *fol.* 15. and if he dies for wan
ſuſtenance, it is his own fault; becauſe tha
preſumption, his ill demeanor bringeth him
ſuch impriſonment.

The *Statute* of R. 3. reſtrains the Sheriff an
ther Officers to take Obligations of their priſon
except the Warden of the *Fleet*, and the Kings
lace at *weſtminſter*. A Sheriff lets to mainpriſe
taken by *Capias* upon an indictment of Treſ
which for the ſurety of the Sheriff, makes an obl
tion to a ſtranger to keep his day, is 7. *E.* 4. 5.
to be void; becauſe taken to another, and no
the Sheriff onely, according to the *Statute*.
there it is held; if the Obligation hath not
Conditions expreſſed in the *Statute*, That it is
the Deed of the party *ex quo ſequitur*, tha
ought to conclude, not his Deed: keeping wit
dammage ſhall be intended by the generalty fo
things, Treaſons, Felonies, Accounts, and fo
times; if another thing is added by the *Statut*

be given, it ſhall make all void; as if a Condition be made according to the *Statute*, and hath another thing not according to the Obligation, is void. So to add other words in a Formedon, or Writ of Waſte, which are given by *Statute*; all is void. So to alien all the Land, when he hath licence for part, the licence is void in all: by the *Statute* of 32. *H* 8. becauſe he hath exceeded the Authority thereby given to him. The *Statute* ſaith, That the Sheriff ſhall let perſons mentioned therein to bail upon reaſonable ſurety of ſufficient perſons in the plural number; and becauſe there is but one ſurety here, the Obligation is void. Alſo becauſe the *Statute* ſaith, That if it ſhall be taken in any other manner then is contained in the *Statute*, it ſhall be void. Alſo here by *Plowden*, yet taken by one at large by the words of the firſt branch, and thoſe aid the third branch; every perſon which extends to thoſe at large, nor for any perſon in their Ward, which extends only to priſoners. 69.

Kidwelly *against* Brand.

LEaſe for years rendring 40.s. Rent by the year at *H.* out of the Land at the Feaſt of *M.* and if the Rent be behind, and not paid by the ſpace of 40 daies after the ſaid Feaſt; then it ſhall be lawfull for him, *&c.* for to re-enter; the Reverſion granted for Life, the Grantee cometh to the Land 40. daies after *M.* to demand the Rent aforeſaid, but demanded it not, and for not payment re-entred, and adjudged lawfull. H. 4. & 5. E 6. In the Common Pleas.

1. A Grantee for Life of a Reverſion, is an

assignee within the *Statute* of 32. H. 8. c. 34. to enter for a Condition broken.

2. The tender of the Rent on the Feast day is not requisite, nor until the last instant of the 40 day.

3. Notwithstanding that the Rent be apppointed to be paid out of the Land at the Feast day, and not the 40. day by expres words; yet it shall be so intended by relation to the place last named.

4. No demand here is requisite; because the the Land which is Debtor, is absent; the contrary is upon a general reservation; and if a Rent seck payable in a forreign County be demanded and denied, there it is not a disseisen by *Plowden* contrary upon the Land.

The place which was once charged with the payment in the hands of the Lessor, remains chargeable in the hands of any other; because he hath this as a Liberty and Authority imposed upon it by the Lessor, and such Liberty is saved by the *Statute* of suppression of Monasteries; and therefore the Lessor, nor the Lessee are not Trespassers by their coming there to tender and receive the Rent.

Ross

ROſſ acknowledged a reconuſance to *Pope*, & after Levies a Fine to him of parcel of his Land, and afterwards *Pope* ſues Execution, and takes the body of the ſaid *Roſſe*, and he brings an *audita querela* in the Chancery, and adjudged that it lieth not. 72. 5.E.6. In Chancery upon an Audita querela.

1. For that the Land is not debter, but the perſon, and the Land is onely charged in reſpect of the perſon, and not otherwiſe, until Execution ſued.

2. For that the purchaſe was before Execution ſued, otherwiſe it had been, if ſued afterwards; for then the Land was charged in *facto*, and not chargeable. And if any part be diſcharged by act in Law, as diſcent, or act of the party, as ſurrender, Feoffment, *&c.* alſo it ſhall be diſcharged, becauſe the duty is perſonall and entire.

3. Becauſe that the Conuſor ſhall not have contribution againſt the Feoffees, but they ſhall have againſt him; and here the Conuſee ſhall not have Execution againſt his Feoffees, for that they may not have contribution againſt him.

Wimbiſh *againſt* Willoughby.

A ſſize directed *Coronatoribus*, in *Lincoln*, upon the ſurmiſe of the Plantiff that the Sheriff was his Coſen, and ſhewed alſo, That one of the Coroners was ſervant to the Defendant, and adjudged good. 73. Tr. 6.E. 6. Aſſize againſt L. Will.

1. For

1. For the speedy expedition of the Assize, the mischief of the Plaintiff, if it should be abated by the exception of the Defendant, and no mischief to him; and here the *venire facias* is awarded the first day, as in a *precipe*.

2. *Coroners* in *Lincoln* shall be intended Coroners of *Lincoln*, for that they are the words of the King.

In the Argument of this case; see first when a Writ Original shall be directed to the Coroner where not. Secondly, and when other Judicial process. Thirdly, an exposition of the words (*de* and *de*) in Writs, Grants, or, *&c.* Fourthly, what words are sufficient to make a Grant of a Rent charge. Fifthly, some matters touching challenges and where they shall be Traversed, *&c.*

Partridge *against* Strange *and* Croker.

78. H. 6. & 7 E. 6. In the Common Bench.

IN Debt the Plaintiff counts upon the *Statute* of 32. *H.* 8. *cap.* 9. Of buying and selling of pretenced Titles and Rights, and alleadge this to be done 28. *April*, 32. *H.* 8. where in truth it was not done this day; and that the Defendants have made a Lease for years of a house, and nine acres of Land pertaining to it, whereof they nor their ancestors, nor any by which the claim were in possession, Reversion, or Remainder, nor took the Profits for one intire year before, *&c.* and holden.

1. That the *Statute* need not to be specially recited and pleaded, because it is general; but

that it is misrecited, it is not good by the Court, *fol.* 84. and yet is surplusage, and it shall prejudice the party in some cases, *fol.* 29. as debt by *I. S.* Parson of *D.* it is a good Traverse, because he is not Parson; or that there is not such a village called *D.*

2. When the Term shall not be certainly pleaded, for that it is Conveyance of the Action, and is not material here, and he which pleads it is a stranger; as an Indictment of the death of a certain man unknown, or the stealing of the goods of a certain man unknown.

3. That a Lease for years, or a grant of parcell of the Right is within the *Statute*; because the *Statute* speaketh of any right, and is not intended only of an entire right, and that the entire value of the Land shall be forfeit by such Lease, *per Curiam fol.* 87.

That this Lease made by one in possession, is out of the *Statute*; for that it is not averred to be a pretenced right, by *Hales* and *Montague*, *fol.* 87. against *Cook*. For they mean that he which hath possession one day, or however may make a Lease, or Feoffment *bona fide*, and shall be forth of the *Statute*, although that he hath not possession, or taketh the profits one whole year without averment, that it is made for maintenance, and the *Statute* shall be intended onely of those which makes Leases, *&c.* having but a right, and not the possession, as *Montague* held, a promise by him which is out of possession, to depart with the Land when he shall attain the possession, is within the danger of the *Statute*. *fol.* 88. And if the Issue in Tail at full age marry a woman discontinuee of his father, and maketh a Lease for years, this is within the *Statute*; for

for that he Leases his ancient right. So by *Morg.* if the heir release to the Abator, and afterwa claiming by discent, maketh a Lease for years, t may be averred a pretenced right, and then within the danger of the *Statute: fol.* 86. and right is within the *Statute*, which comprehends rights.

Pretenced right is, where one hath the possessio and another which is out of possession claims th or sues for it by *Mont. f.* 88.

79. *Morgan*, Serjeant for the Defendant. He whi voucheth a Record, and vary in the year or Ter hath failed of his Record. So the *Statute* here, A& without the consent of the King, when all sent, it shall have relation to the first day of t Parliament, and from that time is an A& of Pa liament, unless it be otherwise appointed when shall first take effect. An act made in the first, second Session relates not but to the first day the same Session. Misrecital shall prejudice t party in some cases; as Debt by *I. S.* Parson of where there is no such Village *D.* a good Traversi and abates the Writ; yet the naming of him Parso surplusage. So here because it recites a *Statute* ce tain made such a day, where it was not, althou that the day is surplusage, it hath made the matt vitious, although it be a general; because the n referring to the science of the Judges, as he doth, he saith generally *contra formam Stat.* &c. a *Statu* hath no words in vain.

Whiddon, for the Plaintiff. A general *Statu* shall not be recited, as 27. *H.* 8. of Conveyanc of the possession to the Use. So the demandant ma Demur without recital of the *Statute* of *W.* 2. *c.* 3 If the Tenant vouches out of the line. So an Ex ecuto

cutor of an Executor ſhall have account without recital of the *Statute* of 25. *E.* 3. *cap.* 5. So 5. *H.* 7. 17. Information for Liveries, good, without reciting of the *Statute*.

Miſrecital of the ſurp'uſage ſhall not make the matter bad, as 21. *H.* 6. 1 by *Newton*; one as an Executor ſhall not bring an action of Debt upon a Contract made with himſelf; he ſhall not ſhew the Teſtament, for that the naming of him [*Executor*] is ſurpluſage. So 33. *H.* 6. 19. by *Danby* in Detinue againſt two as Executors; They ſhall not plead that another is Executor with them, becauſe they are not charged as Executors. But Detinue is cauſe of Action, and the naming of them Executors, is ſurpluſage. A man ſhall not aver that, which by the *Statute* is made apparent; as the Lord ſhew that he entred into the Land within the year, becauſe his Tenant aliened to the Dean and Chapter, he ſhall not aver that it is *Mortmain*, becauſe it appeareth now; nor here that it is a pretenced right, becauſe he counts that the Defendant nor his Anceſtors, &c. were not in poſſeſſion the ſpace of a year before the Leaſe, and then is pretenced Conveyance to the Action (as the Leaſe is here) ſhall not be pleaded. So certainty is the ſubſtance it ſelf, as appeareth 34. *H.* 6. 4. by *Priſot in decies tantum*. If the Plaintiff ſheweth ſuch part of the Record as conveys him to his Action, it is ſufficient without ſhewing all. But a Writ judicial ought to recite the Record certainly out of which it iſſueth; becauſe the Record is the ſubſtance and effect there; and not only the Conveyance a ſtranger to the Deed or thing, as the Plaintiff here is to the Leaſe that he pleads, ſhall not ſhew the certainty of it; as 35. *H.* 6. 8.

after

after *fol.* 148. 13. *H.* 7. 19 By *Fineux*; an an
Major in Treſpaſs juſtifie the taking of goods,
cauſe the Plantiff was out-lawed without ſhew
Pattent, becauſe he is now as a ſtranger to th
for it belongeth to the ſucceſſor, and not to h
So a Wife ſhall have Dower for a Rent Ch
granted to the husband without ſhewing the D
So 7. *H.* 6. 1. by *Strange*; Leſſee in Debt aga
him for Rent reſerved, may ſay, That the Eſt
of his Leſſor was upon Condition, for which b
ken, ſuch a one had entred before the Rent ar
Judgement, if Action, without ſhewing what c
dition.

82. *Sanders*, to the ſame intent. The *Statute* he
although penall, yet becauſe it is beneficial for t
Common Wealth, *viz.* for to avoid maintenan
ſubordination of witneſſes, *&c.* Things taken
of the Words thereof, taken by equity, and
words obſcurely expounded, moſt ſtrong for
Common wealth; and words are but the im
of the *Statute*, and the life thereof in the minds
the makers, and Expoſitors of it, and which
proach neareſt to their minds, are the true Expo
tors; and words ſhould be inclinable to the min
So *vi.* 2. *cap.* 1. *Fines* upon Lands intailed *ipſo j*
ſit nullus, *viz.* as to right, to be bound; but as
the poſſeſſion, is a diſcontinuance, before *fol.* 5
and after *fol.* 137. So the heir may demand the h
ritage of his Mother, aliened by his Father; if
onely Levied the Fine: Yet *Glouceſter cap.* 3. ſai
Whereof no Fine is Levied, intends lawfull Fin
by the Father and Mother: before *fol.* 57. So
Statute Marchant wills that it ſhall be delivered
the Conuſee: Yet 11. *E.* 3. 21. ſhall be deliver
to the extendors, becauſe priſed too high; it ſha

be delivered to the praiſors for the price, after *f.* 172. ſo if the Plaintiff be nonſuit in a ſecond deliverance, the Defendant ſhall recover Dammages by the equity of 7. *H.* 8. 4. Return irrepleviſable ſhall be awarded; and ſo by this means the Plaintiff is barred, and ſo the intent of the makers directs the words and equity of *Statutes*. Leſſee for years 83.
hath a right Eſtate, and Title to Enter, right; becauſe by *Bracton* he hath *jus utendi & fruendi in alieno libero Tenemento*; an Eſtate, becauſe a Remainder in Fee is good upon a Leaſe for years, and a Remainder is not good without an eſtate precedent, Title becauſe 7. *H.* 7. 11. a Termor may falſifie a faint Recovery againſt his Leſſor by the Common Law. So 9. *H.* 6 64. by *Strange*: I grant to *B.* That if my Tenant for life dies, living my ſelf, that he ſhall have for 10. years. *B.* may maintain, becauſe he hath colour, yet he hath nothing, and is in doubt if he ſhall have it for 10. years or not: Then if the Leſſee for years hath ſuch intereſt, that by the Common Law he may maintain, there is no need of a remedy, for all other the *Statutes* before avoid maintenance, the ſuit depending; for the *Staute* of 32. *H.* 8. is made for the avoidance in medling with other mens matters before any ſuit or after. Account ſhall not abate for default of form, if it hath ſubſtance. 6. *E.* 3. *cap. ultimo.* After *fol.* 190. If one be found guilty of an offence which is pardoned by Parliament, Judges ought not to proceed to judgement; yet it is not pleaded, becauſe they are bound to take notice of it; for it appeareth to them by judicial knowledge. 26. *H.* 8, 7. by *Fitz. H.* But if *A.* kill *B.* in the preſence of the Juſtices, and *C.* is found guilty of it. 7. *H.* 4. 41. by *Tirwit* and *Gaſcoin*, the

the Justice ought to respite judgement, becau
knoweth the contrary; but not to acquit c
cause he cannot judge of his own knowledge. 2
4. 47. where it was granted by Parliament, T
A. should have a Writ with Proclamation, ou
84. the Chancery against one G. to answer divers t
spasses which were contained in the Act of Par
ment, and the Writ was abated by award; beca
it did not mention those Tresspasses in certain
because a private Act; and there not recitall,
misrecital, shall hurt.

And as to the cerainty of the Term he shall n
shew it, because he is a stranger to it. As the Def
dant shall plead Joyntenancie of the Plaintiff w
out shewing of whose gift.

All the Court say, That Declarations ough
have certainty. So that the Defendant may k
to what thing he ought to answer (after *fol.* 19
and 3. *H.* 7. 12. So 3. *E.* 4. 21. In Debt for a
lary against a Successor declares, That he was
tained with his Predecessor, and shews not who
tained him; because a stranger may retain h
the Count shall abate by the better opinion
the incertainty; good by *Brook*, *Laborers*, 39
the truth is, That it ought to be conjoyned to c
tainty, as 9. *H.* 7. 3. by *Fineux*, and 6. *E.* 4.
Debt upon payment at two days, whereof the
is come, abates by shewing of the Plaintiff the fa
because he hath shewed falsity. So 20. *H* 6
one ought to reherse the *Stat.* upon which he bri
eth Champerty for to Warrant this certainly, wh
ought to appear alwaies to the Court, but not
one manner; as sometimes by the replication
Assizes, sometimes by Verdict, as in *aquare im*
dit the value of the Church In Ward the valu

the Marriage, in Detinue the value of the goods; as in 20. *H.* 6. *Champerty* was brought, which was not Warranted by any *Statute*; and there *Newton* said, That if the party could not ſhew to them ſome *Statute* by which it is Warranted, that they would award that the Writ ſhould abate. And for that which hath been ſaid that he needs not to recite the *Statute*, and therefore miſrecital is not materials it ſeemed to them, That howbeit he need not, yet if he recites it, and there is none ſuch, then he hath failed of his ſubſtance; for the Court will not aid him, nor think he intendeth any other thing then what he hath ſhewed; and by this abundance in reciting more then needs, hurts the party many times. And therefore in 20. *H.* 6. *fol.* 42. contrary to 3. *H.* 6. 33. *Fitz. H.* Count 15. of forging falſe Deeds, the Writ was of *Diverſa facta*, and *Inſtrumenta*, &c. and he counted but of one onely, and by aſſent of all the Juſtices it was awarded, That the Writ ſhould abate, and ſo abundance abated the Writ.

And if one maketh Title in Aſſize in his plaint where he need not, yet if it be not formall, all ſhall paſs; and yet it was abundance, and more then he was compelled to do. So in the principal caſe. And there it was ſaid, That the Defendants by their demurrer have confeſſed ſuch Act of Parliament the plaintiff hath declared, they held, that adjudging this to be a confeſſion, yet this binds not the Court, which is a third perſon; as appears by 7. *E.* 4. Wherein Treſpaſs of Cattle taken, brought by the Leſſee for years; the Defendant ſaid, That the Leſſor held of him by Rent, which was Arear, and he took the beaſts for it, the Plaintiff ſaid nothing Arear, and there although the

Defendant had admitted the Writ good, yet the opinion of the Justices was, That the Writ sho abate, for that the Lord was Defendant. An if the Defendant will admit good an ap brought by the wife of the death of her Father, 85. the Court ought to abate it, although the party firm it: and a Demur is a Confession of all ters in Fact but not of matters in Law. For the Demurrer he puts it to the Judgement of Court, and confesseth not the Law against self, although the King may wave the Issue, so Demur in Law, and recover; afterward 236. and he hath many other prerogatives, shall he be bound by misrecitall, or by misu or misconceiving of his Action, and there sha bate the Writs where he is sole party: as in case of a common person *à fortiori* where an is party with the King as here; the Plaintiff to shew certainty of the Lease here, by *Cook*, ther Justices not.

In *Decies tantum*, certainty of the Summ rec here, because he shall not recover ten time much, and may not without shewing in Cha ty, the certainty of the first plea here, becaus to the Record.

So in Trespass, if the Defendant pleads F *Tenenemt*; the Plaintiff intitles himself by a made by him; the Defendant will shew th made a Feoffment, and that he entred for Fo ture; he ought to shew the name of the fee, and certainty of the Feoffment, because privy, and in all cases of privies, he ought to the certainty, as 2. *H.* 7. 6. in Bar of Dowe Heir pleaded detainer of evidences, he shall certainty, for he is privy to them, that he affir

appe

certain to him; of a bag ſealed with Charters not; 18. *H.* 8. 1. becauſe the bag ſealed is certain. Indictment *cujuſdam ignoti*, good. *Stamford* fol. 95. and after *fol.* 129. *Statute* penal here not taken by equity by all the Juſtices; as an *Attaint* ſhall not 14. *H.* 7. 13. nor the *Statute* which augments bread by evil making, nor things out of the words ſhall not be taken by equity. But the words may be expounded beneficially, as Treaſon by the *Statute* 25. *E.* 3. for killing of a Maſter, ſo of a Miſtris, are of one effect. 19. *H.* 6. 47. but not by equity, but rather within words. Plural number contains ſingular, by *Hales*. So here pretenced Rights and Titles as ſhall be puniſhed for forging one falſe Deed; yet 1. *H.* 5. *cap.* 3. ſpeaks of falſe Deeds: So for Entry into one Tenement; 87.
5. *R.* 2. *cap.* 7. ſpeaks of Entry into Tenements, under this word [any] the leſſer Eſtate is contained in the greater, as 23. *H.* 6. 10. prohibits that Sheriff ſhall Leaſe his County to farm in any manner, ſhall not Leaſe part thereof (after *fol.* 24.) contrary by *Hales*. This Leaſe here made 88.
to one in poſſeſſion, is out of the *Statute*, becauſe is not averred to be a pretenced right, *viz.* the bargain and Leaſe to be made for maintenance contrary *Cook*) for this was the point of the *Statute* as 9. *H.* 6. 26. if publiſhed onely; yet the *Stat.* in the Copulative, for forging and publiſhing is within the *Statute*, but ought to aver, That was publiſhed to trouble the poſſeſſion and Title of the Plaintiff, for this is the point of the *Statute*. here the Leaſe ought to be averred for maintenance, for this is the point of our *Statute*.

Montague, Chief Juſtice. He that is in poſſeſſion, may buy the pretenced right of another, he

which is out of poſſeſſion, if he promiſe or barg
to depart with the Land, when he ſhall get the p
ſeſſion, is within the *Statute*, and maketh it v
by the Common Law, wherefore the *Statute*
firms it, and adds a greater pain to the thing d
againſt the Common Law; and the *Statute* ſh
be meant to avoid a bargain of Right, when out
poſſeſſion; he which hath poſſeſſion but one ho
alwaies may ſell, or it ſhall be a hard Expo
tion.

Acts expounded againſt the words of the S
tute, becauſe Law and Reaſon allows it. As
nant hanging a *Precipe*, Infeoffs his Son and H
6 *E.* 3. *fol.* 274. after *fol.* 204. good, contra
the words of the *Articuli ſuper Chartas*, *cap.* 2.
cauſe the Son may not maintain to the Father
is bound to aid his father. So an Heir may
his Mother to bring an appeal; as *W.* 2. *ca*
So a Treſpaſs in a Park without hunting, ſhall
be puniſhed: by a year before refers to the C
before onely; ſo that the Clauſe being in poſſ
on, Reverſion, or Remainder, are abſolute,
if for one hour onely, it ſufficeth, and there
89. may alien without danger of the *Statute*, and
no offence is ſhewed to be made againſt
Statute.

Pollar

AN Assise of Freshforce upon a plaint of Intrusion, or of Novell Disseisen, was brought by *John Pollard Esquire*, and *Mary* his wife, in the *Hustings* of the *Guild-Hall London*, against *Bartholmew Jekell*, *Ralph Foxley*, and *Anne* his wife, and eleven others. 10. of them appear by Baily, and plead *nultiel in verum natura*, as one named in the Writ; this shall abate but for him onely, and shall stand good for the others. It was adjudged so in the *quare impedit* against the Bishop of *Carlile*, & many others: where the death of one of the Defendants was pleaded by abatement for speed in avoiding of delays therein. For voucher lyeth not in it, unless the party himself be present in Court, and Protection lyeth not, because excepted in an Assise; therefore it sufficeth, if Tenant and Disseisor relinquish; and the Land is the chief and Original cause of the Action, otherwise in Trespas, for there the person is chief; and the death of one shall abate the whole Writ, by 29. Ass. *fol.* 62. adjudged; but the contrary was held, 44. *E.* 3. 18. 47. *E.* 3. 18.

7. E. 6. In the Guild-Hall London, in the Hustings in time of Lent. 90.

The Parson of Honylanes *Case.*

AN Assise of Freshforce against *Moore*, and a Corporation. The Corporation may not appear by Baily without Warrant, for that it is to defend their wrong; otherwise it is to justifie a Trespas, which is but a personall thing. And al-

7. E. 6. Panel Parson, against Moore & the Mercers of London.

though the Aſſiſe *Pone per vadios, & ſalvos plegios predict. Defend. vel Ballivum ſuum ſi ipſe inventus non fuerit* generally, yet he ſhall be intended a Lawfull Baily by Warrant. And the Defendant pleaded that the Plaintiff hath entred after the laſt continuance, and Iſſue taken thereupon, the Jury gave a ſpeciall Verdict, That he entred for to ſee the antiquity of the buildings at the requeſt of the Defendant, which had invited him to dinner, and adjudged no entry to abate the Writ; for that if he were a ſtranger, he ſhould not be a Treſpaſſer by this, becauſe of the requeſt, becauſe he had not any intent to enter, and continue in poſſeſſion. 93.

The Jury may give a ſpeciall Verdict, and find the matter at large, upon every iſſue by equity of the *Statute* of *Weſtminſter*, 2. *cap.* 30. if this tends to prove the part of the Iſſue onely *per curiam.*

Woodland *againſt* Mantle, *and* Redſole.

94. 5. & 6. E. 6. Replevin. THe Lord incroacheth ſervices of another nature, and avow for this. The Tenure ſhall be Traverſed and not the Seiſen: otherwiſe it is if he encroach more of the ſame nature; as where he holdeth by 12. d. to encroach 2. s. *&c.* There the ſeiſen ſhall be Traverſed; for the quality of the Tenure is Traverſable, and not the quantity. But to avoid the incroachment of the quantity, the Tenant is put to a Writ of Cuſtoms and Services, or *contra formam Feoffamenti*; and this is an Eſtoppel,

pell between true Lord and Tenant onely in Replevin; and the Tenant may make *Rescous*, if he Distrains for this incroachment. And the Lord may not make Title in Assise for this incroachment.

And also this encroachment is intendable onely between true Lord, and true Tenant, and not Donor and Donee, Lessor and Lessee; for there they ought to avow upon the Reservation, which the Tenants may Traverse, notwithstanding the encroachment, by *Plowden*.

The Lord may Seise or Distrain for *Heriot* Service, adjudged; because he hath property in this by the death of his Tenant, and the certainty thereof appeareth by 6. E. 3. 277.

Matters of the Crown at Salop.

97. 1. Mar. at the Sessions in Salop.

IF one be present, and abet a Murtherer, he is principall as well as he that kils the man, and shall be indicted although that the Murtherer flies, and be not attainted, because both are principals in the first and same degree. And he which abets, is not onely principall in the second degree, but if one be Indicted as accessary to two, he shall not be arraigned with the abettor, untill he which flies is also attainted, and adjudged, which agreeth with 40. Ass. 15. 7. H. 4. 29. and 36. *b.* And if the abettor be found guilty by one Verdict, and the Murtherer by another Verdict, is acquitted; now Judgement shall be respited against the abettor, for the Court will give more credit to the Verdict, which was charged directly upon the principal act, then another which is charged implicitely and ob-

1. Mar. at the same Sessions.

FIve were Indicted of Murther of a Servant of Doctor *Ellis's*, and one *venire facias* awarded against all, and they severed in peremptory Challenges; yet the Jurors which were challenged, shall be drawn against all upon the Challenge of one, although that the others challenge him not, but allow him.

1. Adjudged, for that the *venire facias* is intire, that the Court in discretion at the prayer of the Attorney of the King, may sever the Jury and Tales thereupon.

2. They may make one Jury serve severally against every of them by himself.

3. The evidence given against the prisoners prove, That the Servant was killed upon malice prepenced to Doctor *Ellis* himself, which was in company at the time of the Murther. And the Court resolved, That this Malice to the Master extends to the Servant, and all others which defend the Master, and resist the malice of the Murtherers.

4. Resolved also, That if two are fighting of malice prepenced, and a stranger which hath no malice takes part with the one, and kils the other, this is manslaughter in him, and Murther in the other.

5. Resolved, if one be indicted of Murther, and found guilty of Manslaughter, and acquitted of the Murther, yet Judgement shall be given against him that he shall be hanged; for that the death of a man, which is the substance, is found, although that the circumstance is not, yet he was reprieved by the discretion of the Justices.

Fulmerston

Fulmerston *against* Steward.

PLeading that the Masters and confreres of a Colledge was seized in fee, is good without saying in the right of the Colledge; for it shall be so intended, for that they are named by the name of corporation; otherwise it is, if they were named by their particular names. M. 1. & 2. P. Mar. in the kings Bench in trespass.

1. If one plead a Lease of a Mannor, with an exception made to the defendant, and will avoid this for parcel of the Mannor, because of another Lease made to the first Lessee, within a year after the making of the *Statute* of 31. *H.* 8. *ca.* 13. he ought to aver in pleading, that the exception extends not to this parcel; For otherwise it shall so intend strongest against him that pleads it, and then pass not to the first, nor cannot pass by the second Lease, for that is severed for the time by 38. *H.* 6. fol. 38. That a thing in possession may not be parcel or appendant to a thing in Reversion, as a Lease for life of a Mannor, except the services of it is not parcel of the Mannor, But is a *figniory* in gross, and the Land shall be demanded at the common Law, and not in the Court of the Lord (by custom) But here (*quere*) if the acceptance of the second Lease be a surrender of the first, and the severance by the second Lease, and then the severance of the exception is determined; and so the Mannor passes entire, as it was at the commencement. 102.

3. If the recitall of one part of the *Statute*, which maketh for him which recites it, be sufficent.

4. If the pleading of a surrender or grant to the King,

King, by deed inrolled generally, without shew of the enrollment specially, be good.

5. The King is seised *Jure Coronæ*, of Lan coming to him, by the dissolution of Monaster the Tenant pleads a Lease for fifty yeers in l and after by his rejoynder pleads, that the Lease is made good for twenty one yeers by *Statute* of 31. *H.* 8. this is a departure, for that state cometh after the Lease; otherwise it is thing pleaded in affirmance of the Bar, which cedes it.

6. That the second Lease made by an Abb within the yeer of the making of the *Statute* of *H.* 8. to one which hath a Lease for yeers of it fore, without the reservation of the Ancient R then it shall be good for twenty one yeers from the making of the second Lease *per viam.*

Bromley, The Lessee for yeers accepts of a Lease within one yeer after the making of the *tute* of 31. *H.* 8. *cap.* 13. Admitting this Lease to be good by the same *Statute*; yet it good surrender of the first Lease, for that the cond Lease was once good, and shall be expou ed to be void by the *Statute*, as to the King; after the Land comes to the Kings hands, not *ab initio*, and so he shall not avoid the op tion of the Common Law in the Surrender; by the Common Law, the taking of a seco Lease, is a surrender of the first; for both E may not be in one and the same person, one and the same time; For if the L for fourty yeers taketh a new Lease for twe yeers, upon condition that it shall be void i doth not such an Act; the condition broken, voids the second Lease; But not with such re

, that it ſhall take away the Surrender of fourty
eers, beacuſe it was once executed abſolutely. So
f a recovery is had of Land, the which is after-
ards reverſed by error, which avoids the recove-
yet it doth not ſo avoid it, that the Recoveror
all be puniſhed by Treſpas for the iſſues taken
the mean time; two points upon the *Statute* here;
irſt the ſecond Leaſe is not ſo void by the firſt 108.
ranch of the *Statute*; ſo that at the time of the
econd Leaſe made, the firſt Leaſe hath his con-
inuance, but was determined, and the *Statute* is
the copulative, and then it is not determined by
e making of the ſecond Leaſe, which then had his
ontinuance, & then was not determined, finiſhed,
r expired according to the words of the *Statute*.
econdly, the ſecond Leaſe for fifty yeers, is abridg-
d to one and twenty yeers, by the ſecond branch;
r contrary to equity, it will deſtroy the former 011
eaſe and the ſecond alſo; And ſo, that the ſame
eaſe exceeds not twenty one yeers expreſs in the
tatute, extends to the terme abridged, and not to
e intire new term to make the clauſe conditional,
ut to make the State abridged, good for
ne and twenty yeers, and ſhall be as a double
epetition of the firſt clauſe only, and be alſo a
eclaration of the State, and expounded in the fu-
ure tenſe, that it ſhall not exceed twenty one yeers,
hich is all one with the words, for twenty one 109.
eers; as in a writ to the Shereiff, to ſeiz goods
or the King, *Ita quod nullus ad ea manum apponat.*
nd in the *Statute* of Gifts conditionall, *Ita quod*
non habeat poteſtatem alienandi. The word (So) is
ot conditional, but maketh a plain declaration of
e thing before, by the words of the *Statute* ſome-
mes expounded contrary to the text, to make
this

this agree with reason, as by 25. *E.* 3. *cap.* 16. ter *fo.* 295. by the exception of non-tenure of cel, no Writ shall abate but for the quantity of tenure which is alledged, expounded by 5. *H.* 7. where the thing demanded is severall, as Ac for in a *precipe* of a Mannor, if the Tenant pl non-Tennre of parcel, all the writ shall abate, cause an intire thing, and there the deman ought to have an exception in the writ, becau is contrary to reason that a man shall demand intire mannor against one which is not Ten but of parcel of that which he endevors to rec So *Prærogativa Regis* is for the Tenure of hi *Capite*, where the King shall have Primer sei all his other Lands; yet 30. *H.* 8. and afte 204. for *Soccage in Capite*, he shall not have, cause it is contrary to reason that such a 110. Tenure should be so greatly charged. So *w.* 2. 21. gives entry to the Heir, yet he shal not the arrerages in the life of his father, old *brevium* 138. and this exposition is contrary t text, because the text is contrary to reason, to an action to the Heir for a thing in consider of another thing not due to him. So *Glouc. ca* for warranty with affets 21. *H.* 7. 10. & 11. *H.* 4 the things taken by equity is expounded cont to the principall, *Perveyance, Instans est n indivisibile in tempore quod non est tempus nec p temporis, ad quod tamen partes temporis cop tur:*

Townsend

Townſends *Caſe*.

A Woman Tenant in tayle taketh husband who maketh a Feoffment in 20. *H.* 8. to the uſe of himſelf and his wife for their lives, the remainder over, the wife is not remitted, Adjudged. 111.

1. For that ſhe cannot avoid the diſcontinuance by entry, as ſhe might after 32. *H.* 8. *cap.* 28. but ſuch an action (*viz.*) *cui in vita* given to her to recontinue the poſſeſſion, which ſhe uſeth not, but cometh to the poſſeſſion by another mean, ſhe ought to take it in ſuch order, and with ſuch appendances as the Law limits to ſuch mean, & the mean which ſhe uſeth here is 27. *H.* 8. and as the *Statute* appoints the poſſeſſion to her, ſhe ſhall be adjudged in, and not otherwiſe, although ſhe be a Fem Covert; For Coverture or Infancy is not materiall here; for it is not excepted in the *Statute*, And the *Statute* of 27. *H.* 8. of uſes in the firſt branch of it executes the poſſeſſion according to the quantity of the State in uſe; And the quantity of the State in uſe was for that Term of the life of the husband and wife; *ergo* the Eſtate executed by the *Statute*, ſhall be to them alſo for their lives according to the uſe aforeſaid. The ſecond branch of the *Statute* executes the poſſeſſion according to the quality of the Eſtate in uſe; But the quality and manner of this Eſtate was by purchaſe; for they ſhall be purchaſers of the uſe; therefore ſhe ſhall have the Land as a new purchaſe, and in no other manner: for the words Affirmative in the Eſtate includes a Negative, for that where the *Statute* appoints or limits order or form, in things which

ſhall

shall not be by the Common Law before by wo
Affirmative, in the *Statute* includes a Negative,
shall not be in any other manner then the *Sta*
appoints, as execution of uses hereby 27. *H.*
and of voucher, as if he were Tenant by *w.* 2.
4. 14 *H.* 7. 18. and after *fo.* 206. and entry for f
feiture by Jointures, by 11. *H.* 7. *cap.* 20. be
fol. 56. but contrary, and its words in the Ne
tive, *viz.* and not above twenty one yeers, and
continuance of the State shall not alter the pos
sion in other degree then the continuance ma
at first, where the entry is taken away; contraty
where the entry is lawfull, as if the disseisor ma
a Feoffment to the use of the disseisee, and
possession by 27. *H.* 8. but untill his reentry is
remitted, yet after he shall in respect of the
disseisen, and not by possession transferred by
Statute.

3. The wife here is not remitted, becaus
Statute of 27. *H.* 8. executes the possessions of
remitter, *&c.* And if it should be a remitter,
remainder shall be defeated and void thereby,
trary to the words of the *Statute*. And altho
that by the Feoffment, the freehold passeth to
wife, and she remains Tenant thereof after
death of her husband, and is Tenant to the
cipe of a stranger untill her disagreement
disclaimer; yet she may use her action aga
him in the remainder, which is a disa
men in Law; to the use and possession conveyed
means thereof, and then the possession vests in
next remainder, as if the wife had not been nam
or had been a dead person in Law. So if it were
the use of the wife in fee, if she refuse it, she
use her Action of *Cui in vita* against the Feoffo

his Heir; for by her refuſall they are Tenants to her Action, and the uſe reflects to the Feoffor or his Heir; for upon a Feoffment to the uſe of one which refuſes, which is as to the uſe as a dead perſon, or of a thing inſenſible, as *Pauls Steeple*, there wanteth conſiderations, and then the Feoffment ſhall be to the uſe of the Feoffor, and by uſing of her Action ſhe may purge the incombrance by her husband; and ſo no inconveniency, if ſhe were not remitted as was objected. It is not a remitter as the caſe here is, if the Eſtate had been made by immediate Feoffment, becauſe the husband ſurvives the wife (*Littl.* here preſently *fol.* 150.) ſhe is Tenant to the Action of the Heir of the wife; and therefore in 21. *E.* 3. 26. & Aſſ. 2. that the Heir in like caſe enter upon the husband, bringeth an Aſſiſe, and good, no Law now by *Brook*, Remitter, 41.

The Earle of Darby *againſt* Newdigate.

The Earle challenges the Array of the Pannel, becauſe that he is a Peer of the Realm, and no Knight is named in it, and adjudged a good Challenge according to 13. *E.* 3. *Fit. H.* Title *Challenge* 115. *Challenge* by the Biſhop of *Exeter* was taken in *Quare Impedit*, becauſe he had not a Knight named in the Pannel, and it was allowed. 117. 2 Ma. in the Common pleas Aſſiſe.

Buckly

Buckly *against* Rice Thomas.

M 1. Mar. in debt.

DEbt upon the *Statute* of 23. *H.* 6. by Buc Knight, against *Rice Thomas*, the Plan counts, that although he was returned a Knigh the Parliament in a County in *Wales*, whereof defendant was Sheriff, by the greatest number Freeholders of the County; yet the defendant turned not it, But that another was chosen Kni and recites how by the *Statute* of 27. *H.* 8 *Wales* incorporated and annexed, and made parcel *England*, and the Welch Nation by this enab and made inheritable to all liberties, franchi rights, priviledges, and laws of *England*, as other subjects of the King of *England* had, and adjud that he should recover.

1. For that the allegation alleadged under [*licet*] is a precise affirmative by the Rules of g authority, the Latine Authors by the Register, opinion of Doctors of the Civill Law, by *Bro*

2. That the Plantiff need not to shew the nu ber of choosers in certain, for the infiniteness of and for the impossibility that he should take not of it.

3. That the penalty of the *Statute* of 23. *H.* 6. false returns of Sheriffs upon election of Kni of the Parliament, and all other Laws of t Realm, extends to the Welch Nation, by the clause of the *Statute* of 27. *H.* 8. which enab them to it, and not by the generall words of th which makes it parcell of *England*.

The most voices in the upper house shall numbered by the Clerk of the house; for every

there ſhall be ſeverally demanded; Otherwiſe in the Commons houſe; for there the aſſent is tried by the voice and are all at one time; So in Election of Coroners, *fol.* 126. *a.*

Stamford Juſtice. Declarations ought contain the materiall points pertaining by apt words of af- 122.
firmation, and not by recitall, or implication; As by debt upon an obligation, it appeareth by the obligation, that the defendant ſtands bound to the plaintiff in ten pound, the which he hath not paid. So upon an eſcape by which the plaintiff was exonerated from his debt, is not good, becauſe he ſaith not that for the matter in fact he was not ſatisfied when the priſoner eſcaped. So 38. *H.* 6. 14. for debt for a ſalary declare upon retain in all occupations the defendant ſhall have his Law; howbeit in the generalty imply husbandry, in which Law they will not, which is not expreſſed plainly, but by implication, that he was retained in Husbandry. The Law of *England* prays aide of other faculties and ſciences in matters appending to it; as of Grammer for the expoſition of Latin words, as of *a renuntiatione tori Communia* 9. *H.* 6 3. So adjudged *imaginavit* which was amended in the writ, becauſe no ſuch word in Latin, 9. *H.* 6. 35. So of *Penticoſts* 11. *H.* 6. 2. *H.* 7. 16. of Latin for fine Gold by Sanders 125. 7. *H.* 6. 11. aide of the Civil Law for the difference of *Compulſion preciſa & cauſativa*, 21. *H.* 7. 35. of Surgeons for maihem of the Canon Law, 20. *H.* 6. 25. Of vigor of an appeal pleaded againſt an excomunication, the uſuall form ſhall be obſerved and good, as in debt, when the defendant acknowledgeth himſelf to be bound, &c. So in for- 123.
gery againſt one only *quod falſa conſpiratione habita*, 11. *H.* 6. 2. becauſe the uſuall form, where

a man may not have by common intendment
cise notice of the certainty of a thing, it suffic
allcadge this generally, as 21. *H.* 6. 9. & 9.
15. that executors have administred to *B.* wi
shewing what things, good; because he may
know that another hath administred, and that
not privy. So 5. *E.* 4. 8. Obleige to disc
the Sheriff of all things touching his office, h
that he had discharged him generally, good; be
for the infiniteness of it. *Talbot* and *Corbet*
tempore H. 7. upon the same *Statute* 23.
where the issue was joyned that *Corbet* was
Knight for the Parliament, and he was adm
to prove it, &c. So 2. *E.* 4. 19. imprison to ma
obligation to the defendant, & to others unk
without naming them, good; contrary in
imprisonment. So 10. *E.* 4. 19. bound for to
in all lawfull commands, he said that he had
him lawfully, untill such a day without
ing in what, good. So in 12. *H.* 7. 14. he had
him meat, drink and apparel, untill one and
ty yeers without shewing what, good. So
verunt homines without shewing the numb
cause a great number; for the Law compels
shew the certainty of the thing which is no
known or remembred, *Brook*, Chief Justice,
and in Parliament, the most voices in the
house, shall be numbred by the Clerk of the
for every one there shall be severally dema
otherwise it is in the house of Commons, fo
the assent is tryed by voices, sounding all
time; So in election of Coroners, S
fo. 126. the County of Chester was alway
eel of the Realm of England, yet Knights
gesses came not from thence untill the Sta

34. & 35. *H.* 8. *ca.* 13. *Statute* penall extends not further then the words, and namely for to punish others, as 21 *H.* 7. 21. of malefactors in Parks 124.
extends not to Forrests. So 13. *H.* 6. *cap.* 10. that Sheriffs shall not let their Counties, extends not to him which Leases parcel of it 21. *H.* 7. 36. the contrary was held 20. *H.* 7. 12. and before *fol.* 87. So treble dammages for a forcible entry in an Assise or trespas extends not to entry in the nature of an Assise 7. *H* 4. which limit order for the election of Knights, extended not to the false return of the Sheriff, untill 11. *H.* 4. was made; if *London* inlarge the Ancient custome (*viz.*) that a villein shall not be drawn out, which hath remained there a yeer and a day, because Ancient demeasne 7 *H.* 6. 32. extends not to enlargment. So *England* altered not the subjection of *wales*. Rape is made fellony by *w.* 2. *ca.* 34. Abetters inquirable *cap.* 12. and at one time, good 2. *E.* 2. 22. 2. 3. yet Chapter the 12. seeme to be intended of fellons before made, and not by the same *Statute*.

Sanders justice; the allegation alledged under 125.
the (*viz.*) is a plain precise and effectuall affirmation in deed proved by Rules in grammer, the authority of Latine Authors by the Register 66. 60. *natura brevium* 63. 134 *b.* 135. *b.* and the opinion of the Doctors of the Civill Law 21. *E.* 4. 19. and after *fo.* 143. by *Catlin* an Abbot in discharge to be collector saith *inter Record.* of such term *continuum* that *R.* 2. had granted to his pre-
decessors, that he nor his successors shall be collect- 126.
ors, and naught, for it may be contained amongst the Records, and yet no Record; escuage was first invented to suppress the *Welch* and *Scots* rebels a-

gainſt whom war was made by the King of *England*, as againſt Rebels, and not as againſt enemies for that they were ſubject to *England H.* 3. 127. *E.* 1. his eldeſt ſon Prince of *Wales*; and ſo it continued to this time; which Act of *H.* 3. the firſt alteration of *Wales*. King *E.* 1. made *Statute* of *Snowdon*. The third was the *Statute* 27. *H.* 8. the *Welch* may ſue by *quod ei deforceat* the nature of what action they will: *Statutes* ſometimes explaines the Common Law, *Merton cap.* *quod vidua legare poſſunt bluda*, &c. and late *Statutes* aided by equity *Statutes* made before; ſo neal warranty Bars not the iſſue in taile with aſſets by the equity of *Gloceſter* made long before after *fol.* 78. ſo Land delivered in execution by *Statute* of *Marchants* 13. *E.* 1. yet it ſhall be delivered alſo to ſo high extendors, although *E.* 1. ſpeaketh not of it by equity of *Action Eure* 11. *E.* 1. *cap.* 2. which giveth goods priſed at high priſes in dammage, and that the Conu ſhall have them for the price, becauſe it intends to aide things, in like degree, although not *i* then.

Brown, Juſtice to the ſame purpoſe, and ſaid, In things touching Grammer, their predeceſſ have conſulted with Grammarians, and purſ their Rules, as it appeareth in our books, that the Judges have ſaid *proximo antecedenti* *Relatio*, the which ſentence they might take out Grammar, and he argued that (*licet*) was a pl affirmative, and that the matter contained un the (*licet*) is an affirmation with greater vehem cy, then it ſhould be without the (*licet*) and the *licet* augments the affirmation. And he arg further that the generall words of the *Statute*

27. enabled the plantiffe to take benefit of the penalty, and in what he said agreed with *Sanders* in effect.

Brook chief Justice. *Gavel kind* commenced by the *Brittans*, by partition of *England*, *Scotland* and *Wales*, between the three sons of *Brute* continued by *Bellinus*, *Brennus*, *Ferrex* and *Porrex*, and was altered in *England* by the conquest of the *Saxons*, and the eldest son by their Law was inheritable. But *Gavel kind* continued in *Wales*, until 27. *H.* 8. for it was not conquered; Priviledges within certain precincts or Dominions followed, not the enlargement of the place. So 38. *H.* 6. 10. Liberties granted to the Bishop of *Durham* in *feodis suis* extends not to the purchase after. So 21. *H.* 6. Warren is granted to *B.* in all his Lands in Dale, and he purchaseth other Land in Dale, he shall not have warren there. So a grant of Conusans of Pleas of a thing parcel of the mannor of Dale tenancy escheats, afterwards he shall not have of it. For the grant taketh execution of his precinct, and circuit at the time of the making of it, and the services shall be then parcel of the mannor, and not the demeans which now escheat. So grant *Wreck* to *B.* in all his Lands, it shall not extend to the Land of which he was then disseised, because not his but the disseisors pro tempore. Reference to another thing shall be as this, to which it is referred it, As if a man make a Lease for so many years as *I. S.* hath in the mannor of *D.* there he shall have so many yeers as *I. S.* hath, and shall take averment that *I. S.* had so many *issiut tale modium quale* I.S. *nuper habuit*. So 11. *H.* 4. & 9. *H.* 7. grant office taking such fee as *I. S.* which executed the same before had, ought to be shewed

129.

130.

what he had. So 20. E. 3. the King granted to [illegible] tales liberties, that the Town of N. had by [illegible] ing of the records or writings, prove their li[illegible] ties, the grantee shall have the like.

Brownin g against Beeston.

131. 3. Mar. in ba. Roy Trespass.

LEase for years by Indenture, by which [illegible] Lessee Covenants and grants to render and [illegible] for that land, thirty seven pound yeerly, at two [illegible] of the yeer, naming them, or within two moneths [illegible] ter at a certain place out of the Land; and m[illegible] over Covenants & grants, if the said rent and [illegible] of thirty seven pounds be areare and not paid [illegible] time limited without any demand of the Le[illegible] then the Lease shall be utterly void, extinct, a[illegible] no effect; and that it shall be lawful for the lesso[illegible] re-enter; and after the rent was not paid, and be[illegible] the entry, the lessor maketh a new Lease, and the [illegible] Lessee bringeth trespas against the second Le[illegible] and he pleads the matter aforesaid, and pleads [illegible] condition in this manner, as in the Indentur[illegible] contained, and saith not precisely, that the Le[illegible] had Covenanted as aforesaid; And also said, [illegible] the Rent was arear by the space of two mo[illegible] next after the said feast, and adjudged for [illegible] plaintiff for these two causes only.

1. That the pleading of the Covenant, whi[illegible] contained in the Indenture, that the first L[illegible] hath covenanted, is not but a recitall, and no[illegible] press averment, that he hath made such a Cove[illegible] *in facto fol.* 143. by *Bromly*.

2. Because that the pleading of the Rent [illegible] for two moneths, varies from the Indenture, [illegible]

is after two moneths, *fol.* 143. *b.* by all contrary to *Catlin*, for he said, that this is to be intended so if ecessity.

Matters in Law are left at large, but the better pinion was for the defendant.

If this Covenant and grant of the Lessee to pay hirty seven pounds yeerly, be a reservation of he Rent or not, and by *Ramsey*, *fol.* 132. it is

1. For that it is not issuing out of the Land he way of Charge; for *pro terra* implies a cause the grant and is not words to Charge the Land.

2. It is not a Rent service for default of words reservation of the lessor, as *reddendum*, *reservan- tenendum*, &c. for this commences by words of Lessee, and which amounts not to a sum in ross, because it goeth not with the revertion, as which hath Land on the part of the mother, ma- a Lease for yeers by Indenture; the Lessee ovenants and grants to pay to him and his heirs enty shillings Rent, the Lessor dies without issue; heir on the part of the mother, shall have the ertion; and on the part of the father, the Rent, that it is a some in gross, and not a Rent ince- to the revertion.

3. It is not farm, because it is not a Rent, be- they are all one.

4. It is a void condition, if it be a condition, use it refers to the farm and Rent, where there any such, as a condition that the Feoffee infeoffe a Corporation, which is not; or his is voide, because the first is impossible, and the against Law; but the state, because it is

Precedent in defeaſans of which they are mad
ſhall ſtand good.

Stamford and *walſh* Juſtices, *fol.* 134. It is
Rent; firſt this Covenant and grant is equivale
to reſervation, and is by Indenture, in which t
words are the words of both, and taken for t
words of him which moſt aptly ſpeaks them, a
Rent upon a Feoffment, *Litl.* 47. is a gra
of the Feoffee, and in Judgment of Law ſhall d
poſe words which have ſubſtance, formality, a
words there ſhall be taken indifferently; For
parties aſſent, and are privy to the ſpeaking
134. them. But words of a deed poll, taken more av
able to the grantee, 20. *H.*7. 8. by *Brian*, and t
Law expounds one word in the ſence of anoth
as 10. *E.* 31. 14. *H.* 8. 2. 21. *E.* 3. 49. Reve
for Remainder, So it taketh a word ſpoken by o
for the word ſpoken by another, and namely
Indenture, and although it were not a Rent, bu
ſum in groſs, yet it extends to it, and to iſſue o
of the Land for the Law, becauſe it is ſpeti
alleadged the ground of payment of a ſum to
for the Land, and yeerly to be paid, and the ou
executory for the other; For (before) *fol.* 71.
Land recovered by an elder title, ſhall not p
which hath not the thing which ought to pay, as t
E. 4. 4. if he may not have the ancient Pale, he is
cuſed to make a new, ſo 9. *E.* 4. 10. if he will
give counſell, the other ſhall ſtay the Annuity,
39. Aſſiſe 23. Rent for equality of partit
charge the Land parted, not mentioned becauſe
Rent was granted and executory for the land.
2. *H.*7 5. it ſhall diſcend to the heirs of the gra
without naming, becauſe it cometh in reſpe
the Land, which ſhould diſcend to the heir,

wh

when the ground of the matter appeareth, the Law supplies the fault of the words, because the Law respects the ground of the matter and consideration.

Gawdy. It is not a rent, *fol.* 136. in 39. *H.* 6. 33 all the words shall be taken the words of one party, *viz.* The first in the Indenture wherefore they are not the words of both, because it estops not the other party; and an estopple discends upon the Heir of him which is Heir at the Common Law, because he is Son by the half venter, neither Sister, or Brother by the entire bloud; and although they agree to have the same, yet how, *viz.* as a rent or not, is not parcel of their agreement. So it shall not be construed a rent, because words may have a reasonable construction; otherwise in 22. *E.* 4. in the case of the Prior of *Bingham*, the Covenant was of a rent which shall be intended rent service, the Fine saith not *predictum redditum*, but was of five acres and was for the land, and the Grantor was Tenant, so holden there to be an annuity; so here. 136.

Morgan, it is a rent, *f.* 137. *b.* for the assent of the parties is the chief matter to be considered, and not who speaks; for the Lessor shall not have debt for the rent reserved, unless it be a Contract; and it is not a Contract without the assent of all; and the words comming out of the mouth of one shall be the words of all in the operation of the Law. 137.

Catline. To the same purpose, because words equivalent to a Reservation; for the Law takes words of substance, and not usual equivalent; and words of substance is usuall, and the Law regards the effect and substance more then form; the words and

and ſubſtance will ſupply the form, rather then the intent of the parties ſhall be voide; as Leſſor and Leſſee for life makes a Feoffment, it ſhall be a Feoffment of the Leſſee, and confirmation of the Leſſor, yet no word of Confirmation (be *fol.* 59.)

And ſo if a Tenant for years, and the Leſſor make a Feoffment in Fee, this ſhall be taken a Livery and Feoffment of the Leſſor, and ſurrender of the Leſſee; and yet there is not any word of ſurrender of the Leſſee, but ſhall be ſo taken by the judgemen of Law.

So a rent granted by Tenants in common, in ſeverall, becauſe eſtates ſeveral; yet words joint (after *fol.* 161. 171. and *Perkins* fol. 22.) ſo *rennavit communiam*, 9 *H.* 6. 35. (after *fol.* 162.) it is a Leaſe; becauſe where words are equivalent in
141. ſubſtance, the Law will appoint how they ſhall enure, and in Contracts it is not materiall, who ſpeaks the words, if the other agree; for the Law reſpects it, and the words which prove the aſſent and have ſubſtance ſufficient.

And therefore 21. *H.* 6. if the words of the Obligee make a Condition, *viz.* the Obligee *vult & concedit*, if the Obligor *ſteterit arbitrio*, yet ſince they are the words of the Obligor for Condition, *Books cond. fol.* 58. abridge this contrary.

So an annuity *pro conſilio*, or a rent for Compoſition of Tythes, 9. *E.* 4. 16. enure as words Conditionall, and a Covenant that the Farmor ſhall not be impeached for waſte, amounts (21. *H.* 6. 47.) to hold without impeachment of waſt, 17. *E.* 3. 9. a Widow aſſigns land of greater value then the Dower to the Widow, and the ſecond Husband, who granted a rent by the ſame Deed to him, with diſtreſs for the

over.

overplus, and the Deed recites this, the Wife Leſſee after the death of her husband, becauſe the Grant to pay the rent for the overplus of the land, a good reſervation; for otherwiſe he ſhall not be bound contrary before of a Grant for reaſonable Dower, and no mention made that the land was more worth then the Dower, becauſe without conſideration there, and is a Collateral thing; and ſo words ſhall enure upon Acts between the parties concerning the principal matter, and Collateral matter, differ alſo; the ſumm is certainly recited, and the rent ſhall be this ſumm (for the ſentence ſtands good, without words, rent, or firm) where thoſe words ſhall be adjudged void, rather then the certainty expreſſed to be void; as 4 E. 4. 29. *I.* is obligee to *B. Solvendum* to *I.* yet good, and the Count ſhall be to be paid to *B.* for the intent of the parties makes this good.

So a Grant of Remainder by the name of Reverſion of the land, a good Grant, notwithſtanding the miſ-terming of the thing, becauſe the certainty of the land appeareth; but by a Grant of all Reverſions, a Remainder doth not paſs, becauſe the grant is in generalty; and ſo certainty by ſpecial terms, and by general differs. So where he ſaith, if all rents ſhall be arear, and where the ſaid rent of 37. l. 3. s. 4 d. in certain.

So words containing generalty, and incertainty; and ſpecialty, and incertainty, differ; to pay 10 s. at *Michaelmas* 1599, and at the ſame Feaſt of *S. Michaelmas* next enſuing other 10. s. there the ſumm is taken the like; for that it cannot be the ſame if it come after; ſo one word taken for another ſupplies the intent of the parties. 142.

2. That the Covenant and Grant for not payment,

ment, that the Leaſe ſhall be void, is not a Condition by *Ramſey, fol.* 133. becauſe it is not ſpoken by him which gives the eſtate; as if two Joynt-Tenants make a Leaſe upon Condition, and then one Leſſee enters, he ſhall not enter but in one moytie, for that he gave no more; and the words of one, becauſe the Law ſaith, he ſpeaketh only for his moytie, ſhall not make this Condition to another which ſpeaks not. And alſo the Condition is ſubſequent in time of the *Statute*, which was executed before, for the Demiſe and *habendum* maketh the Leaſe (contrary by *Stamford* and *Wast.* fol. 135.) for that the parties are ſo agreed by Indenture, and the one party and the other aſſents; and therefore all one as if he had reſerved the Condition payment, which is called Rent, and is a Condition annexed, for to avoid the Eſtate *Litt.* fol. 70.

So here, becauſe the ſumm certainly named, be it a Rent, or ſumm in groſs; for it is not requiſite that the Leſſor ſhould ſpeak; but if the words of the Indenture had intendment to avoid the eſtate, it ſufficeth, and the words ſhall be taken agreement of every party, and not ſpoken by one party more then another, as proviſoes are, or *ſi contingat*; and all the words of a Deed ſhall take effect at one inſtant, becauſe the delivery is at one inſtant; and it hath not ſeveral times proved, by 10. *aſſ.* 15. where ſeveral Deeds delivered at one and the ſame time, the one being a Leaſe for years, the other a Charge upon Condition to have Fee, if diſturbed; before *fol.* 34.

So 9. *H.* 6. 35. Leaſe without impeachment of Waſte, provided, That he makes not voluntary waſte in houſes is Conditional; and waſte lies becauſe

ecauſe all made by one Deed; if by two Cove-nants, yet it is not ſpoken by the Leſſor, more then he Leſſee, but ſhall be taken as an agreement of oth the parties.

Gawdie, Juſtice to the contrary, *fol.* 137. De-eaſance of a thing Executory, as an Obligation, Recogniſance, or Warranty, 43. *Aſs.* fol. 44. good; f a thing executed, not. As 43. *E.* 3. Defeaſance f a releaſe, unleſs delivered at one inſtant; nor of Leaſe executed, by *Morgan* it is Conditional, *fol.* 142. 38. For Covenant lyeth not here, becauſe that Covenant lyeth of a thing to come, and to be done y the perſon of ſome one, and not of a thing to be xecuted in it ſelf; and therefore if the words e-re not to the effect, to determine the firſt Leaſe, ere they ſhall be void, becauſe it may not enure o another effect.

It is not a Condition by *Brooks*, becauſe it is ot reſtrictive and compulſarie, as are *Ita quod non* f the Leſſee doth ſuch an Act, or if it happens, or roviſo; but a proviſo alwaies maketh not a Con-ition, as in *Dockwraies* caſe, 27. *H.* 8. 15. be-auſe voluntary; for Leeſſee without words com-ulſary of the Leſſor, Covenants and Grants, That will remove, *&c.* by *Catlyn*, fol. 142. is a condi-on, becauſe it implies the intent of the parties to Conditional, yet it hath not the uſual words Feoffment, to pay 20. s. or inſtruct his Son ſuch an Art.

For it is a Condition, becauſe the parties pur-ort ſuch intent. So proviſo, That the Leſſee make ch a thing.

So here, it ſhall enure as a Condition, in what-ever manner it be called, it ſhall enure as a De-mination of the Leaſee, becauſe it was made at time when the Leaſe began.

If

If the ſecond Leaſe admit it be a Condi
ſhall be good before re-entry, or not. *Ramſey*,
133. It is not good, becauſe after the Condi
broken, untill he enters, he hath but a Title
cauſe he may not grant, and the Leaſe contin
and the poſſeſſion alſo.

And therefore 22. *E.* 4. 37. Leſſer ſhall
have Treſpaſs untill entry, 14. 3. Aſſ. 11. Di
eſtop his entry, becauſe it affirms the contin
of his Term.

Where a man may enter, he ought to enter
not have the thing; and where he cannot
he ought to make claim before he ſhall have it
a Reverſion granted upon Condition which
ken, the Rent is extinct without Claim, fo
he may not have it by Claim; by *Stamford*
walſh it is good, *fol.* 136. for that the firſt Le
years commenced by words without entry,
be determined by words without entry; Le
life not, 2. *Mar.* fol. 142. becauſe Livery an
ſen, which gave the *State* and *Entry*, which
to be avoided by entry upon Condition bro
it is expreſſed here how the Leaſe ſhall be av
viz. by entry; and there if he enters not,
an Act which excludes him to Enter, as the
of an acquittance, or diſtraining, there the
is good; But the words here, are utterly
diſſolving the Leaſe without Entry, and no
after ſhall make it good; and the words of
try here, are ſurpluſage, and take away the eff
the firſt words.

As to 22. *E.* 4. The Leſſor cannot puniſh
becauſe the entry was firſt with his aſſent
when the Leaſe ended, he was Tenant at
ance; but he may make a Leaſe to another,

determines his will; by *Gawdy* it is not good. Void here, shall be expounded void by Entry, as *W. 2. cap.* 1. before *fol.* 82. *Finis ipso jure sit nullus*, viz. to the right; yet it is a discontinuance. So by 3. *H.* 6. *cap.* 10 Outlary shall be void in Indictment, or Appeal, if no *Capias* in the County where he dwelleth.

Common Law, 19. *H.* 6. 2. expounds it shall be void by Writ of Error; he that hath a possession in Law, may Lease before entry, after *fol.* 142. after a stranger hath abated, not, because another hath possession in Deed.

So a Lease by the Husband for years, shall not be void of the Wives land after his death before entry of the Wife; for possession ought to be defeated by possession, and possession ought to be gained by entry.

Catline, fol. 142. *b.* By the not payment, the first Lease is determined without entry, because it may be made by word without other circumstance, (otherwise of Free-hold) and therefore may make a Lease, but cannot have Trespass without entry, as Heir (before *fol.* 137.) he may make a Lease before entry, but cannot have Trespes before entry, 21. *H.* 7. 22.

So a Lessee may grant his Term before it commence, 22. *E.* 4. 37. yet he shall not have Trespass before entry, 37. *H.* 6. 18. To shew two matters where both are effectual, and answerable, makes a double plea, as 3. *H.* 6. 32. Feoffment upon Condition to infeoff the Heir, and averment of the Collusion in Wardship of the body.

So 20. *H.* 6. 7. Seisen in his Ancestor and himself, by avowing.

So 22. *H.* 6. 37. Two continuall claims, *viz.*

by

by the predeceſſor, and the Plaintiff, for to avo
diſcent.

So 19. E. 4. 4. by *Vaviſor*, and *Brian*. Two
ſcents in Fee bars not; two diſcents is
double in Tail, becauſe one anſwer (*viz.*) he g
not, makes an end of all; for if he cannot
one thing without the other, it is not double;
if the one is purſuant to the other, as fully admi
ſtred, and ſo nothing in his hands; for the laſt
but a concluſion of the former. But the other
ſtices, held the aforeſaid two exceptions effectual
the cauſes aforeſaid, and that the Rejoynder
vicious; wherefore they ſaid, That it was in v
to argue them, and therefore in conſideration
them onely, without reſpect to the other matter
ſing upon the Rejoynder, and before debate, t
awarded for the plaintiff.

Throgmorton *against* Tracie.

M. Mar. in the Common Places, ſecond deliverance

A Man makes a Leaſe for life, and after Gra
the Reverſion of the Land *habendum*, the la
at *Michaelmas* after the determination of the f
Leaſe for life for one and twenty years, and
judged a good Leaſe for years of the Reverſion,
of the Land Reverting, and that the *Habend*
ſtood well with the premiſes, becauſe that the la
is the degree, and ſtate of the Grantor was incl
ded in the premiſes, by the word [Reverſion,] a
the degree and eſtate excluded by the *Habend*
and the other part onely granted, *viz.* The la
Re

verting, and so was the intent of both the parties.

Reversion is compounded of the remnant of the 151.
state which is left in the Lessor, and of the land reverting, and carries with him the land to be afterwards happening in possession, and the land is the substance of both, and by the grant of this both

So the Mannor which is compounded of Demaines and Services, and of *stagno aqua piscaria*, 152.
&c. or *gurgite*, which consists of water and land.
The *Habendum*, which is not pursuant to the premisses, is void; as a grant of a Mannor *Habendum*, the Rent parcell of the Mannor, because in the grant it was Rent service, and in the *Habendum* it is Rent seck.

So a Grant of Services, Homage, Fealty, and Rent *Habendum*, the rent to the Grantee in Fee, this *Habendum* is void, because in the grant the rent was contained as a rent Service, but here it is rent Seck, and grant of it after the death of *I. S.* void; for the nature of a Grant is, that the thing Granted ought to pass presently (after *fol.* 155.) for it is a thing in possession, and is granted as a Reversion where no reversion was of it.

If one maketh a Lease of land for years, and afterwards maketh a feoffment of the same, without livery it shall not the Reversion by Attornment, *Quere*, because the Grant of a thing which includes all interests in it, shall make the Reversion to pass, but 153.
the Reversion granted, shall not make the possession to pass. 38 H. 6. 34. and (after *fol.* 399.) The King Grants a Mannor, to which an Advowson is appendant for life, the Advowson passeth not; not if he grant the Reversion *Habendum cum advocationem*

tione, it passeth not, because in gross, because was not mentioned in the first Grant: but the re- version of an Advowson may be parcel, or appe- dant of, or to a Mannor in possession, not pos- sion of, or to the Reversion of a Mannor, the *He- dum* passes not; a thing not parcel, nor appe- dant, or appurtenant, unless it be compriſed in t premises.

The Office of the *Habendum*, is for to limit t estate; as a grant, a Rent, (and stay there) is for t *Habendum* for a year, is for one year, 7. *E.* 3. by *Trew.* 7. Ass. 1. *Perkins fol.* 22. The *Haben* repugnant to the premises, void, and the estate be- fore the *Habendum* shall stand. 14. *H.* 8. 13. by *lard*, *Perkins* fol. 34. Contrary 13. *H.* 7. 23. by *neux*, a Grant to one and his Heirs *Habendum* Life.

So to two *Habendum*, to the one of them two life, the Remainder to the other for life, becau severs the joynture in the estate.

So a grant of two acres to two *Habendum*; one acre to one, and the other to the other, bec it includes the interest of every one in one acre. Lease of land reserving the profits, or two a except one, void, because parcel of the thing gr ed.

Doctor and Student, *fol.* 98. Reversion is a T nement, and ought to vest presently as a Re on, and not at a day to come; otherwise it i land Reverting without estate, and agreed of by the Serjeants for the Defendant.

154. Every Deed shall be construed most strongly gainst the Grantor, and if it may be taken to effect, by any reasonable intendment, it shall and the intent of the parties shall be observed.

here of using this word [Reversion] not in its proper signification; for then it first ought to vest, as in Reversion presently by Attornment, and not at a day to come; but as a demonstration certain of the land, *viz.* all the land that they have in Reversion; and that they will not have the land to pass in the degree of a Reversion, but in degree of Demeasne.

And the Law will, (That when the intent appeareth,) incline the words not apt of their proper and common signification to the intent, and one word shall have the sense of another, as *Litl.* fol. 21. *Dedi & concessi* by the Disseisee shall enure as a confirmation.

So 17.*E.*3.8. Mannor pass by the name of Fee *de Chivalry*.

So 10.*E.*4.4. 5.*H.*7.1. plead Demise by words of licence to occupie; where one word includes in it one thing, as here Reversion includes the land; the thing included shall pass by the word, as 11.*R.* 2. *Piscary* pass *per a quam*, and 40.*E.*3.45. *Soil* by *Piscary*, and by *Turbary*. 7.*E.*3.342. So *Soil* and *Mine* by *Gorse*, for 14.*E.*3. Formedon lyeth *de gurgite*.

So 6.*E.*3.183. By the name of one acre *cornuagii*, for *Cornish* acres contain so many. A man grants his Remainder of one acre, to have and to hold the same Reversion of that acre, good; because the Law respects the intent of the matter, and applies the words to it.

So a Gift in Tail, reserving the first three 155.
years a Rose, and after 10. s. good, because one rent is substance.

A man seised of two acres, Leases one for years, and after maketh a Feoffment of both, Livery in

this wherein he hath poſſeſſion by Attornment, the Reverſion of the other paſſeth, 7.*E.*4.21. So 30.*E.* *Totum Molendinum ſuum*, the Reverſion of the whole of the Mill which was in Dower, paſs; but Tenant for life ought to Attorn upon the Grant. *Brook* grants f.30. the *Habendum* explains and corrects the words of the premiſſes, as here the word [Reverſion of the land] to the land it ſelf, being the ſame ſubſtance.

So 7.*E.*3.308. A Rent Granted out of a Manor, to take off one acre of the ſame Mannor, no thing ſhall be charged but this acre, in performance of the intent of the parties, by the Serjeant for the Plaintiff.

Anthony Brown, Serjeant for the Plaintiff. Tenement compriſeth a Reverſion, as 33.*E.*3. the King licences to purchaſe Tenements in *Mortmain*, he purchaſes a Reverſion, good *Fitzh.* grants, 46. and *Cook* Alienation *fol.* 55. is Advowſon; your word [Tenement] here, agrees not with the premiſſes.

Firſt, becauſe that in the mean time after the firſt Leaſe finiſhed at *Michaelmas*, the land is in poſſeſſion, and then it is not a Reverſion, becauſe no particular eſtate; and therefore may not veſt as a reverſion, as 21.*H.*7.11. (before *fol.*25.) Remainder may not veſt, but during the particular eſtate, and not at the ending of the firſt eſtate upon Condition broken.

So 10.*E.*3. dower of a rent reſerved upon an eſtate Tails good, ſo long as the eſtate continues, otherwiſe it is if the Tail be altered in Tail after poſſibility, or Tenancy by the Courteſie, for that the inheritance is determined, and the rent is now in another degree. 12.*E.*3. and 10.*H.*7.13. by *Kn*

if a rent be granted with a ceſſing during the non-
age of the Heir, the Wife ſhall have Dower, and 156.
Execution ſhall be ſtaid, otherwiſe, the Wife of
the Son dying within age; for that during the Ceſ-
ſer ſhe had not poſſeſſion.

Secondly, becauſe the Reverſion cannot be
granted at a day to come, for then he ſhall have the
particular eſtate in the mean time, and ſhall be
Leſſor to himſelf, and 38. *H.* 6. 38. a man cannot
reſerve the leſſer eſtate, giving the greater, without
Attornment of the Leſſer, as in 8. *H.* 7. 3. by *Vaviſor*,
before *fol.* 152. *A.* hath rent in Fee, and grants this
to *B.* after the death of *I. S.* void, becauſe the Fee
paſſeth preſently, if ever; and then he ſhould have
Franck-tenement of his own grant, until *I. S.* dies.
And the Eſtate ſhall not be ſo devided without al-
teration of the whole Eſtate; for a thing *in eſſe*
cannot be granted to be *in eſſe* one time, and to be
ſuſpended, or differ from the other: but a new
rent may be granted to commence at a day to
come; for there he ſhall not have the particular e-
ſtate in the mean time, becauſe not *in eſſe*, before
(after *fol.* 197.) Time material ſhall void the thing
in all, *viz.* both the premiſſes and *Habendum* not (*e
converſo*) if it may not paſs according to the limi-
tation thereof, becauſe time parcel of the parties in-
tent, and if it may not paſs as to the intent, all is
void.

As a man hath a Rent or Term, and Grant
it, if he ſtay there, good; if he ſaies beſides *Ha-
bendum* after the death of *I. S.* all is void, (after *fol.*
250.) So the Remainder void if the Termor enter
without Livery, *Litl.* 12. But if the Term was to
Commence at a day to come, the Remainder over
there, it is void notwithſtanding Livery, becauſe

there is no eſtate preſent to which the Livery
be annexed, ſo that the time of Commence
is materiall, and Livery before its Commen
ment is void; and Livery ſhall not deſtroy
time, but the time the Livery, and grant; every
ſhall be taken ſtrongeſt againſt the makers,
moſt beneficial to him to whom it is made, and
hath liberty in another ſence to his advan
then the words purport *prima facie*; for every D
ſhall be conſtrued to ſome purpoſe, and not to
void, becauſe it is made to ſome purpoſe, as 21
6. 8. one may plead a Leaſe for years, and a rel
as a Feoffment.

So 7 H. 6. 7. and 22. H. 6. 42. The Feoffm
of a Joynt-Tenant, as a confirmation.

So 9. H. 7. 2. The King by Parliament conf
the eſtate of the Patentee, *& dat & conceditur*,
may uſe it as a Grant or confirmation.

157. So in 21. *H* 7. 23. Obligor may plead a Gr
That it ſhall not be ſued before *M.* in Bar, or
a Covenant for it.

So here, the party uſes this as a Demiſe of
Land, and not as a Grant of the Reverſion; for
Reverſion of the Land compriſeth the Land,
Litl. fol. 106. after *fol.* 161. a releaſe of all the
to him in Reverſion, is good.

So 5. *H.* 5. 8. A Leaſe for years, and after a g
of the rent, this changes the reverſion.

So *Litl.* fol. 150. recovery of the land againſt T
nant for life, will diveſt the reverſion.

So 19. *E* 4. 9. Writ of Covenant and the C
cord, is of the land to paſs the reverſion.

So *Quid juris clamat* recites, That the land
granted before the reverſion was.

So before *fol.* 149. Formedon ſhall ſay, *de*
meſſuag

Stagnio where the Reversion was granted in Tail.

So a Reversion in Fee Granted to a Termor, he hath the intire Term presently in Possession; for the reversion of the land compriſes the land in substance; one word will pass the thing by another word, having the same sence, yet varying in name, because one same thing and intent of the party, as 2. *H.* 6. 4. before *fol.* 134. and afterwards *f.* 190. reverter for remainder.

So 3. *H.* 6. 6. makes a Testament, and commits Administration, is an Executor.

So 20. *H.* 7. 11. Retorn for revert by the Grant; by Grant of the Church, Advowson passes, 14. *E.* 2. by Grant of the name of a Clerk, a presentment passeth.

So before *fol.* 151. by *Stagnum molendinum*, the soil passes, and the thing contained in the premiſes named in the *Habendum* by another name containing the same in substance, is good.

So a Grant of the nomination of an advowson *Habendum*, the advowson, good. So *Manerium Habendum* the services.

So mannor by Fine *Habendum*, one acre of this in Fee, he shall have the acre in Fee, and the Mannor for life, because it wanteth limitation of the estate in the residue of the Mannor.

So a Gift of a Mannor *Habendum*, the reversion in Fee of one acre, which is in Lease for life, good, not for the acre, and for life in the Mannor, because the estate is expressed in it.

So *Litl. fol.* 120. confirms the estate of Lessee for life *Habendum*, the land in Fee, good, because the estate land was contained.

So a Joint-Tenant confirms to another *Haben-*

dum, the land to him and his Heirs, the Fee will pass; the *Habendum* may limit the estate to a stranger not named before in the premisses, as 13. *H.* 7. 17. a Devise to *I. Habendum* to him in Fee, after the death of the Wife of the Devisor not named before, hath an estate by implication of the intent of the party.

So 5. *E.* 3. 17. a man gives land *Habendum* to Franck marriage with a Daughter.

So a Lease to *A. Habendum* to him for 20. years, the remainder to *B.* in Fee, good, because the intent of the parties; therefore *a fortiori* here the *Habendum* may explain the intent of the parties in the premisses.

Dier, Serjeant for the Plaintiff. A reversion is *Jus sine possessio revertendi & nomen verbale quia tenta revertens*, after the particular estate ended, proved by *M.* 2. of Advowsons of Churches, and
159. prayer to recite the reversion, if he shall overlive the Tenant for life, and bringeth waste, good. 14. *E.* 3. Fines saith, remanera and not revertera, where the reversion was granted, before *fol.* 157. a reversion granted in Tail; Formedon in remainder lieth, because the entire estate is not given, *Fitzherb. br.* 118. *D.* 10. *E.* 2. the Heir grants the other two parts with a third part in Dower *cum accidentibus*; reversion of Dower pass. 33. *H.* 8. *cap. ultima* the statute making of Leases in reversion is expounded, That they shall not make Leases beginning after the first ends *ad firmum dimiserunt*, imply that the parties intend, that it shall enure as a Lease of the Demesne; for properly a man may not be Farmer of a reversion, nor have an *Ejectione firma* of the reversion.

No Attornment needs upon a Lease for years, becau

because it is a Contract *interpretationem apportet ea benignam ut res valeat*, as 30. E. 2. *Discendera pro Remanera*, 6. E. 2. *recipe pro re-entry*. So a gift to one for life *& post ejus decessum* to *I.* in Fee, good remainder for the manifest intent; an *Habendum* giveth an estate which was not given before, and to a stranger not named before, and alters the estate given in the premisses as a Confirmation to Husband and Wife, or to Tenant for life, remainder in Fee to another good, *Litl.* 129. 160.

So *Habendum* by molty, *Litl.* 66. makes Tenants in common, 8. E. 3. 427. by the better opinion, a gift to two *Habendum*, to one for life, and after his decease to another in Fee, the one shall have the entire for life onely, notwithstanding the Joynture in the premisses.

Otherwise *fol.* 153. if it be comprised within the Grant, good in the *Habendum*; as a Grant *De dispositione Ecclesiæ habendum advocationem*, grants *d* Soil, the Wood *habendum*, the Wood *defundo domus, habendum domum, Manerium habendum*, the advowson appendant, good: but a Grant of Common out of the land *habendum*, the land or herbage of a Park *habendum*, the Park and such like are not good, because not comprised in the premisses.

Stamford, Justice; rules of Exposition. First, deeds shall be taken most beneficially for the Grantee.

Secondly, they shall not be void, where the words may be applyed to any intent.

Thirdly, words shall be applyed, *viz.* expounded to the intent of the parties, and not otherwise. The intent directs gifts, rather then the words, as 41. E. 3. 6. 16. H. 7. 10. by *Fineux*, Grantee of annuity

nuity *pro conſilio*, hath divers faculties; yet the Councel ſhall be given in ſuch a faculty as was intended, 9.*E*.4.22. one bound to pay *Recepta & recipienda*, ſhall not pay what he received not, but that which he hath received, becauſe the intent is taken more forcibly then the words. 7.*E*.3.7. Leſſee of a houſe, which may for his profit make houſes there within, may not pull down, or make waſte, if the intent was not ſo.

Sanders, Juſtice to the ſame intent with the
161. Plaintiff. Expoſition of Deeds ſhall be reaſonable without wrong to the Grantor: as a Grant of Corrody, Eſtovers, and Common for all Beaſts, it ſhall not have with Goats, and with the largeſt advantage to the Grantee; as a Diſſeiſor releaſes all his right to the Termor he hath for his life, *Litl. fol.* 108. (before *fol.* 140.) two Tenants in Common grant 20. s. it ſhall enure as ſeveral Grants, 34.*H*.6. *fol.* 11. Grants *totum piſcariam ſalvo ſtagno molendini ſui*; yet the *piſcarie* paſſes not, for the *ſtagno* ſhall be excepted, and not the *piſcarie*, becauſe he hath a Reverſion in the Propriety of the land, and poſſeſſion of the Ter-Tenancy.

The nature of an *habendum*, is to give in large, or qualifie. *Malitioſa juris interpretatio herere in verbis*, &c. the words are but witneſſes to the contract, reverſion includes land by all.

Brown, Juſtice. To the ſame intent of the *Abbot*, and Covent, and of *Smith*, and his wife was to have the land paſs as a Leaſe after the paticular eſtate ended, and not otherwiſe; and from that hour that their intent was to have the word [reverſion] enure that way, it ſeemed to him, That the Law would warrant it, for the land is included in the reverſion, for if it was not; a man by Granting of a reverſion,

ſion, could not have the Land in poſſeſſion after the particular eſtate ended.

And a Feoffment of a *Carue habendum*, the Manor of *D.* is good, if the *Carue* maketh the Manor. And if land is parcel of an Office, it ſhall paſs by the Grant of the office. Much more he ſaid tending to the effect to make the Leaſe good, and ſo the Plaintiff ſhall recover.

Brook, Chief Juſtice to the contrary. Eſtate in lands, includes land it ſelf: land is a generall word and contains Grantor; and reverſion particular words, containing a Decree where one eſtate onely: intent ſhall be inclined, and ruled by the Law, and not otherwiſe; and intent nevertheleſs in certainty of words, as 9. *H.* 6. 35. *Renuntiavit communium*, and not to whom, void, (before *fol.* 122.) 13. *E.* 3. Husband and Wife Tenants for life grant reverſion of the Land that he holdeth by Homage, Fealty, and Caſtle gard; the Lord grants all Services, Caſtle gard paſſeth not, becauſe he granted not the Caſtle. But in Teſtaments, the intent ſhall be onely obſerved, and rule the Law, becauſe the Teſtator had not time by preſumption to ordain all things according to the Law. In concluſion he agreed that Judgement ſhould be given for the Plaintiff.

Hill

Hill *against* Grange.

167. 3. Mar. in Common Pleas in Trespass.

A Man maketh a Leaſe for years of a Meſſuage, and an hundred acres of land appertaining to it, *&c.* by Deed, indented the 6. of *Auguſt*, reddring rent yearly, payable at our Lady day, and *Michaelmas*, or 10 days after, with clauſe of reentry, and after Grants the reverſion, and the Grantee the laſt inſtant of the 10. day after *Michaelmas* demands the rent, and enters for not payment, and it was adjudged that the entry was good, for theſe reaſons.

1. Land may not appertain to a Meſſuage, becauſe both are things corporate ſimply; otherwiſe of Advowſons, waies, *&c.* which are things Incorporate; but things Corporate, or Incorporate, may pertain, or be parcel of a thing compounded: as a Mannor, Caſtle, Knights Fees, Honors, Foreſts, Monaſterie, Rectorie, *fol.* 170. *a.* But here the land paſſes as appurtenant, but by the intent and phraſe of the parties (as they have ſaid) uſually occupied or let, *&c.*

2. The rent ſhall be paid at the firſt Feaſt of *M.* for otherwiſe it cannot be annual, notwithſtanding the other feaſt be firſt named, 10. *E.* 3. the *Abbot of Oſneys* caſe.

3. The demand of the rent the laſt inſtant, is good.

4. That the Gantee of a Common perſon is an Aſſignee to have benefit of a Condition, or Covenant, *fol.* 173. *a.* and ſhall not be intended of the Pattentee of the King.

5. That the Pattentee of the Heir and Succeſſors

of *E.6.* ſhall take benefit of the Condition by equity of the ſaid *Stat.* and not by the words.

Things of diſtinct and ſeveral natures, the one is not parcel of, or appendant to the other, as 8. *H.* 11. by *Keeble*, a Warren cannot be pertaining to a *Leet*, nor a *Leet* to a *Hundred*, nor one Office to another, nor land to other land; to a thing Compounded they may, as a Mannor, Knights Fee, Honor, Monaſtery, Caſtle, and a Village; or to words general, as are Oxgang, a yard land, a hide of land, which contains land, meadow, paſture, wood, *&c.* 168.

Meſſuage is a ſingle word, conſiſting of a thing ſpecial, and not Compound, nor a general word; for that 27 *H.* 6. 2. Land not parcel, or appendant to a houſe, and by demand of a Meſſuage in *preciſe*, land ſhall not be recovered, and therefore paſs not by the Grant of a Houſe, by the Serjeants on the part of the Plaintiff.

23. *H.* 8. and 31 *H.* 3. by Feoffment of a Meſſuage with the appurtenances; Land paſſes not a Mannor, and things made appertaining to it, are made by uſage, and continuance; So 2. *H.* 7. 28. land belonging to a Forreſt, and Warden of the Fleet, and the houſe of the Maſter of the Rolls, and divers farms to the Guardians of the Caſtle of *Colcheſter*, and one Office to another; as the *Cuſtos brevium* giveth one of the Offices of *prothonatories*, and uſe and continuance is cauſe of it. A man Leaſes a Meſſuage, and land rendring rent, he ought to demand the rent at the Meſſuage, becauſe moſt worthy, *Perk.* 166. Meadow appertains to land, 3. *E.* by the Serjeants on the part of the Defendant.

Norwood

Norwood *against* Read.

181. 5. Mar. in K. Bench.

Action upon the case upon *assumpsit* made by the Testator, lieth against the Executors, adjudged.

For that the Testator could not gage his Law, otherwise it is where he might gage his Law; for the ignorance that the Law imputes of it to Executors, and therefore there they ought to Demur; but if they plead in Bar, which is found against them, they have lost the benefit of the Law, and take Conusance of it, whereof otherwise, their ignorance shall excuse them, 39. *H.* 6. 19. 12. *H.* 8. 11. 27. *H.* 8. 23.

Woodward *against the Lord* Darcie.

5. Mar. Reso. by the Judges of both Courts.

If the Debtor make the Debtee his Executor, and leaves him assets to satisfie the debt, and dies, the Debtee may pay himself by way of retainer, by the Court, 12. *H.* 4. 21. according.

And in such case the Action is not utterly extinct by the Administration; for that the Law intends that he is satisfied by retainer before; and so a thing in Action, altered to a thing in possession by Act in Law for satisfaction of the party, which hath no other remedy: but if he hath not sufficient assets for to satisfie the debt, the administration there extinguishes not the Action, because that he cannot retain for parcel, and have his Action

gainst

gainst the Heir for the residue, but ought to do the one for the other at his peril.

Wrotesly *against* Adams.

A Lease for 80. years of a Farm, the Lessor granted the Reversion of the Farm to a stranger, to have and to hold the Farm for 60. years after the end and expiration of the first Term of years; the Lessor maketh a Lease for life to the first Lessee for years during the first Term, and the second Lessee enters, and upon an *Ouster*, bringeth *Ejectione firme* and by the Court it well lyeth. Tr. 1. El. in Com. Pleas. Ej. firme.

1. By the Law, by a Grant of the reversion of the Farm; the Farm, and all the Demeasnes of it pass, because it is *nomen collectivum*, and certain in its self; and so it was adjudged in the case of *Bridges*, That by the Demise of the Farm, the reversion and rent incident to it, passeth.

2. That the word [*Reversion*] shall be intended land reverting in the premisses, and the *habendum*, and not the estate in reverter, which hath his continuance but in respect of the Term; and during it, it is a Grant of the reversion *habendum*, the farm, or land, or reversion after the particular estate ended, are all one.

3. That the second Lease for years commencing by any determination of the first Lease, whether it be in Law, or in Deed; and the expiration refers to the Term, and not to the years; Term is an estate for or for years, and is finished when the estate is finished, and this may finish when the years remain.

If a man marry with a woman Termor, and the woman

woman dies, her husband shall have the Te
for notwithstanding that the marriage hath no
vested this out of the woman during coverture
by her death, this is given to the husband by A
Law, because it is a thing in possession, and
in Action.

The Law is the Common use in Letters, Pl
and Judgements, and the Common Law is
common use; by *Anthony Brown*, fol. 195.

Stradling *against* Morgan.

2 El. Exchequer, dict.

EXceptions alleadged in arrest of Judgem
upon not guilty pleaded by the Defend
and found against him.

1. The Plantiff hath shewed in his Declarat
That the Defendant was then receiver, *&c.*
saith not, That the Mannors were the Qu
then, and therefore shall be intended more str
against him, then it should be to a common per
and by consequence the Defendant is Bailly
common person; by the Court.

2. That no receiver or Bailly accomptant
common person, shall be within the *Statut*
7. *E.*6. c. 1 but onely of the Queen by the Court.

3. That the Action was not maintainable,
the matter well alleadged, lieth in the Qu
Courts at *Westminster*, notwithstanding the *Sta*
of 34. and 35. *H.*8. for *Wales*; for that they
in the Affirmative, and not in the Negative.

4. That by this *Statute* an Action of debt
original Writ lieth for the forfeiture in the Ex
quer, howbeit that the party hath not cause of p
ledge there.

5. Th

5. The Plaintiff ought to make mention of the *Statute* of 38. *H.* 8. and 7. *E.* 6. in his count, for that the one is founded upon the other.

6. He ought to shew expresly in his Count, That the Queen was seized, and made him her Bedel.

7. Jeofails remedies not mispleadings in counts adjudged in *Moor* and *Cliffords* case.

In Debt the Plaintiff counts, That whereas he was Bedel, and Collector of certain Mannors, by vertue of Letters Pattents of *H.* 8. and had a Fee for it, the Defendant being Receiver of the said Mannor, in 3. and 4. *P.* and *M.* took extortion for the payment of his Fee, *viz.* 4 d. for every pound, against the form of the *Statute* of 7. *E.* 6. the Defendant pleads not guilty, and found against him.

And yet judgement given against the Plaintiff, because the Count was incertain to whom he was Receiver, and shall be intended against him, then one to a Common person, and a Receiver of a Common person, is not within 7. *E.* 6. yet within the words; for the intent of the makers shall be observed in the exposition of *Statutes*; and so acts general in words have been expounded to be but particular, where the benefit hath been particular.

As the King shall not have Wardship of lands which discends to the youngest Son, but of that which discends to the heir general, 12. *E.* 4. *Stamford*, fol. 8. yet the Tenant dyed seized of others in Fee, because the *Statute* of *Prærogativa regis*, cap. 2. intends where the land is holden of the King, and a Common person discended to the same Heir where one is Heir to the Tenant.

And *Prærogativa Regis*, cap. 3. intends not the Soccage *in capite* shall give to the King primer seisen of lands, holden of a Common person, yet the words are general (before fol. 109.) *Stamford* Prerogative *fol.* 13.

So *Marlebr.* cap. 4. intends, where Signiory and Tenancie are in the same County; and therefore the Lord may bring a Distress taken in one County, to a Mannor in another County, of which the land is holden, 1. *H.* 6. 3. 30. *E.* 3. 6. (before *fol.* 1[illegible]) So *Glouc.* cap. 1. giveth Damages to the Disseisee against him which is found Tenant after the Disseisor, for that he is Tenant by his own agreement, and therefore the Disseisee shall not recover Damages against him, which agrees not to a Fr[illegible]
205. ment made to him, and others by the Disseisor, yet he is Tenant, but not Tenant by his agreement. *Litt. Remitter*, fol 153. so long 5. *E.* 4. fol. 1[illegible] he hath view in a precipe, and afterwards abates the Writ for false Latine, or for some other cause apparent, he shall again have another Writ, because there the Court might have abated this without motion.

For *W.* 2. cap. 49. although general, intends where the Tenant abates the Writ by exception, not apparent, by 25. *E.* 3. cap. 16. by [illegible] tenure of parcel, no Writ abateable; but for the quantity intends, if the thing demanded be several, as Acres; but all the Writ shall abate where the thing demanded is entire, as a Mannor, (before *fol.* 109.) and the intent of the *Statute* never was contrary to the Text.

By *W.* 2. cap. 25. if one fail of a Record, he shall be a Disseisor; yet a woman Covert, shall not be, (11. *H.* 4. 50.) nor infant, because excepted by

the intent, yet in words hath included all. So extenders shall not pay presently according to the words of *Acton*, *Burnel*, which ought to answer presently, *&c.* but shall be debtors presently with the duty, and chargeable with the payment, and daies payable of the rent, or Revenues receivable.

So by Exposition it seems against the Text of the *Statute*, and is not, because the intent of the makers guides them to it.

Of the part of the Defendant it was argued, 206.
That the Action shall be sued there in *Wales*, where the receipt is alleadged, although that *Wales* is united to *England*, by 27. *H.* 8. because by the same *Statute*, *Wales* is divided into 12. Counties, and by 34. and 35. *H.* 8. four Justices are appointed for *Wales*, *viz.* one for every three Counties, and hold plea of all things within their circuit, and one seal appointed for every circuit, and all Actions suable there by the words of the *Statute*. And when the *Statute* appoints place, order, and form of suits, and before what person, it shall not be altered.

As by *W.* 2. cap. 11. an Accomptant found in Arrearages, shall be imprisoned in the next Goal, although it be in another County, 27. *H.* 8. (before *W.* 17.)

So by *Westminster* 2. cap. 3. Second deliverance shall be sued out of the same Court, where the first replevin was granted, and not elsewhere.

So 31. *E.* 3. c. 12. Error in the Exchequer shall be corrected before the Chancellor and Treasurer, and therefore not before others.

So an Affirmative, because general, implies a negative exclusively; so all Actions shall be sued

in *Wales*, and not elsewhere, is implied here, as by *W.2.cap.4.* he shall vouch in *Quo die deforceat*, as if he were Tenant, and included, and not otherwise; and therefore shall not vouch *in scire facias*, where it is the first Writ, because he cannot vouch there, (before *fo.113.*)

So the issue in Tail shall not be remitted, because he hath the use as a purchaser, by 27. *H.* 8. for the *Statute* of 27. executes the possession in the same manner as he had the use; which implies, and not in any other Mannors. (before *fol.* 114.) So by 31. *H.* 8. Leases made by *Abbots* after this *Stat.* adjudged void, when Abbies came after to the King by dissolution, because the *Statute* saith, That the King shall have it as it was then, which implies a Negative, and therefore the King shall not have them now in Reversion by making of such Leases, or before he hath them in possession.

On the part of the Plaintiff it was argued to the contrary. And they agreed to the cases of voucher in a *Quod ei deforceat* of the Execution of the use, and of the committing of an accomptant to the next Gaol; for where an Act maketh a new thing Affirmative, and gives to them Authority to do that which they could not before, there they shall be in the order limited by the *Statute*, and not otherwise; and at the Common Law there was not any voucher by the demandant, nor any coming to the land by the use, nor any power given to Auditors, to commit an Accomptant to prison; and therefore there, that which is limited by such Statute ought to be pursued accordingly; but where the Action, which was before at the Common Law, is given by any *Statute* in any case where it did not lie before, there this Action is suable in all Courts

therefore

therefore used by the Common Law before, if there are not expreſs words to reſtrain it; for where one Act affirms a former before, there the laſt Affirmative deſtroies not the firſt, nor takes any thing from the Jurisdiction of the firſt, but declares That they have power.

So 34. and 35. *H.* 8. hereby the Affirmative takes not away the Jurisdiction of other Courts given to them, by 27. *H* 8. for uniting *Wales* and *England*.

Sanders *againſt* Freeman.

210. M. 3. and 4. Eliz. in the C. P. Quid juris clamat.

The Conuſee of a Fine, brings a *Quid juris clamat* againſt Husband and Wife, Tenants for life in the right of the Wife, and pleads that they were ſeized in Tail in the right of the Wife, and how, and thereupon are at iſſue; the Jury gave a private Verdict for the Defendant, and after in open Court contradicts it, and found for the Plaintiff; for they were charged openly in Court, and ought to give their Verdict there openly: and the other was but matter of courteſie to eaſe the Jurors, and not of neceſſity; for the Plaintiff could not have been nonſuited upon it; otherwiſe upon a Verdict given in Court, and by this Plea, the eſtate for life was at the will of the Plaintiff.

A Verdict ſecretly given to the Juſtice out of Court, is not a Verdict, becauſe taken of courteſie, when Jurors agree for their eaſe, until aptly pronounced in Court; for at every verdict the Plaintiff is demandable, and then may be nonſuited; but before he is not, and therefore the laſt open Verdict ſhall ſtand.

Also the Inquest may change their Verdict given in Court if mistaken, or not plain in Law, or for other reasonable cause immediatly perceived, as to find not guilty, and immediatly guilty, because they may be mistaken, this was received in the Kings Bench.

So 4 H. 4. 2. in Conspiracie, acquit one, and found another guilty, because it was contrary in it self, they may find both guilty, and good.

Dutchie of Lancaster.

4 Eliz ar Serjeants

HENRY 8. makes a Lease for one and twenty years, under the great Seal of the *Dutchie* and dyeth; after *E.* 6. being within age, makes a new Lease to a stranger, under the same Seal for years after the Determination, Surrender, &c. of the first Lease, and dies; and by all the Justices Queen *Elizabeth* could not avoid this second Lease for the nonage of the King *E.* 6. howbeit he was seized of the *Dutchie* in his natural body, because he hath the imbecillity of infancie; yet this is invested, and adorned with the dignity of the body politique of the King, which is utterly void of such imperfections.

A Lease by the King within age of *Dutchie* is good, although he was seized of the *Dutchie* in his natural body, which hath the imbecillity of infancie, because he hath the natural body invested and adorned with the estate, and dignity Royal, by conjunction of the body politique to it, which is utterly void of such imperfections; and so when both bodies remain in one person, all the bodies shall have the properties, qualities, and degrees of the body politique

politique, which is the most worthy; and no Act of the King made as King, shall be defeasable by any disability in his body natural; and therefore the letters partents of the King within age, good. So a gift of the King by *Thorp. 36. ass. pl. 54.* So 6. E. 3. 291. the King shall have right of seisen of his ancestor within age. So the King hath by purchase, or discent, in capacity of his natural body when he is King, or before that he was King, and being given, this within age, good; and shall pass by the Letters Pattents onely, and without Livery, because he may not make Livery in his natural body, disjoined from the politike body which are in one and the same body, and indivisible, and it is contrary to the dignity Royal, for a King to make livery in proper person; and Livery is matter in fact, and the King must have his Acts recorded. So the King need not demand rent reserved upon his land by a common ancestor; but shall not enter if the Condition be broken, until it be found by Office, if he purchases, and sels before he is King, and within age (if King also, then otherwise it is;) yet after he is King, he shall avoid it by his nonage before; but shall not enter without Office, because his person which had right of entry before, hath now the estate Royall united, which cannot do any thing without Record. And so Acts that the King doth 214.
touching things which he hath in his body naturall, require the same circumstances and order, as things which he hath in his politique body by the union thereof; for the thing possessed changeth not from the person of the King, but the person; nor doth the possession change the cause of a thing possessed.

Henry the 4. which was Duke of *Lancaster*, held his Dutchie annexed to the Crown, as parcel of it

by the assumption of the Crown; and because his Title to the Crown was defeasable, and because he would preserve the Dutchie to his Heirs if he should be removed from the Crown, he severed it from
217. the Crown by a *Statute* made 1. *H.* 4. as it was before onely in course of inheritance of the Land, and of the Government of it, *viz.* for the manner of Conveyance, as it was before in the hands of the Duke, as by Livery and Attornment, but not severed from the Crown for the prerogatives of his person, as 10. *H.* 4. 7. *H.* 4. the King had a *scire facias* against the Lord Le strange with a *non omittas* for the Dutchieland. So 3 *H.* 6. *Rot.* 112. the Commission of a Ward hath aid before issue, and a *procedendo* with a Clause of not going to judgement *Rege inconsulto*. So the person of the King for Dutchieland taken to be higher then a Duke, because he shall not have aid untill after issue of the Duke, for that he is a Common person, and shall make a Lease by the name of KING, because he drowns the name of DUKE in his Realm; therefore Officers finding that he held of the King as of the Dutchie, and not as of the Duke; of, and by 3. *H.* 5. all Charters of the Dutchie land shall be
218. sealed with the Dutchie Seal, or should be void, to the end that all possessions of it should be distinguished and known from the possessions of the Crown for the policie aforesaid, because he was the Lineal heir to the Dutchie; and as the Dutchie was in the hands of *H.* 4. so in like manner it was by *H.* 5. and *H.* 6. But *E.* 4. because he was lawfull heritor to the Crown, annexed the *Dutchie of Lancaster*, and made it to be forfeit to the Crown and so he altered the course of inheritance of the
219. of the natural body, into the politick body of the

King

and his Successors, but not in the manner of Government, name, &c. but separates it from other possessions of the Crown, in conveyance of it by another Seal, and other means, *viz.* by Livery and Attornment, which are used for the possessions thereof, as 21. *E.* 4. 60. Land of the *Dutchie* in the County *Palatine*, passe by Patent out of it by Livery, because there he hath it as Duke; and by the *Statute* of 1. *H.* 7. the *Dutchie* was severed from the Crown, and made inheritable to the natural capacity of the King, as it was in *H.* 5. because *H.* 7. discended of the House of *Lancaster*; so is it in *E.* 6. the Queen made a Feoffment of the *Dutchie* Land forth of the County *Palatine*, to be holden *in Capite*; the Feoffee shall hold *in Capite* of the Crown, and not as of the *Dutchie*; for that the King is not Duke within his Realm, but may be when he is out of the Realm. 220. 223.

Willion *against the Lord* Berkly.

A Fine was levied to two, and to the Heirs of one, with Grant and Render to the Conusor in Tail, the Remainder to King *Henry* the seventh, and to the Heirs Males of his body ingendred, remainder to the right Heirs of the Conusor; the Conusor dies without issue; and after *H.* 7. entred, and died seised; and *H.* 8. gave the land to the Queen his Wife, for her life, and died: *E.* 6. Granted the reversion to one, and his Heirs; and dyed without issue, the right Heir of the Conusor entred, and his entry adjudged lawfull. 227. 4 Eliz. in C. P. in an Ej. firme.

So the King shall be in a worse condition then a common

common person; for a common person may bar the inheritance by a common Recovery suffered by him, otherwise of the King, by *W.* 2. cap. 1. after *fol.* 244. *a.*

1. That the Writ of *Ejectione firme* that wants words, *bona & Cattalla ibidem inventa cepit & asportavit*, is good, if the truth of the matter be so and proces of *utlarie* lieth in this writ by the Common Law *fol.* 228.

2. The Entry of King *Henry* the seventh is lawfull without office; for that the Law casts the Freehold upon him; otherwise it is where he taketh a estate by Office, as Ward, Perquisites of villains, &c. and the right Heir may enter without Office, or *Ouster le main*, by the same reason, *fol.* 229. *a.*

3. Where the parties agree upon the matter in deed, and conclude upon the matter in Law, thereupon *Nil refert*, but the Court shall adjudge according to the Law, *fol.* 230.

4 Recitall of one part of a generall Statute is good enough, otherwise it is of a particular Statute, *fol.* 232. *a.*

5. Omission of the date or place of Letters Patents is not materiall in pleading, nor Averment. *fol.* 231.

6 A feoffment pleaded without entry of the Feoffee, is good; because it is included in the livery, *fol.* 232. *b.*

7. The fee vests by the guift before the Statute of *W.* 2. and is made more perfect by the meanes of the issue; *fol.* 233 *a.*

8. The pleading that *H.* 7. had issue, and died without issue, is repugnant of his own shewing; otherwise it is where it cometh on the part of the defendant, *fol.* 233.

9. The

The pleading that one enter untill that the [illegible] entred upon him, and made the Leaſe (is [illegible] good there) without ſaying, that he quited him, and made the Leaſe.

The King ſhall be bound by the *Statute* of *W.* 2. of Gifts conditional, for that it is in preſervation of an inheritance in benefit of the publike good, and reſtitution of the intent of the donor, and the opinion that the donee might alien after iſſue, before the *Statute* of Gifts conditional, hath been a common error.

As to the matter in Law it was ſaid by the Serjeants of Counſel with the defendant, that the capacity that the King hath in his naturall body after that he is King, Remains, and the State Royall confounds not this capacity, as 45. aſſ. pl. 6. *Henry* the third gave the Mannor to the Earl of *Cornwall* in fyle, who exchanged it by a deed for another Mannor, and died without iſſue, and warranty and aſſets diſcended upon *Edward* the firſt his heir, he is barred, and therefore the aſſignee of the party to the exchange had reſtitution, out of the hands [illegible] who had ſeiſed it, and ſo by this warranty and aſſets which diſcended upon the naturall body of the King, was a Bar to the reverſion that he demanded in his body politike; And as a King may take as heir by diſcent in his naturall body, ſo may he purchaſe. As 34. *H.* 6. 34. and by pleading there *H.* 6. ſeized in fee of an Advowſon in gros, conveyed it from *H.* 5. to him who granted it to the plaintiff, good; without ſhewing *in jure Coronæ*, or how; and there if the King hath Land, parcell of the Crown and parcell by purchaſe, and dies, having a ſon and daughter by one venter, and ſon by another, who enters and dies without iſſue, 234.

the

the daughter shall have the Land purchased, and the son the other. So purchased Lands by the King shall go to the naturall body. So 35. *H.* 6. 3. by *Moyle*, (after *fol* 247.) Land in Gavel-kind given to the King and his heirs, the eldest son being King, shall not have all, because it vests in his naturall body, but perquisites of a villaine the King hath *jure Coronæ* (as 41. *E.* 3. 21.) if a Bishop who hath a villain in the right of his Church enfranchise him, he shall hold it in his body politick, and shall be it the right of his Church, because the signiory was [illegible] a thing in respect, or by reason of another, shall be in the same degree, and right, as the principal was at the Common Law. That an estate of inheritance, *viz.* Fee-simple, was by the Common Law before the *Statute*. First absolute when a gift was made to a man and his Heirs. Secondly, conditional, when to him and the Heirs of his body, for that form don in Reverter at the Common Law, if the Donee dies without issue in Remainder, not; for a remainder cannot depend upon a Fee Conditional until this *Statute*, and before this *Statute* the Donee might alien after issue had, so bar the issue, because they construed the having of issue to be a performance of the Condition, which was implied in the words, and in the intent of the Donee, and after issue, to be as an absolute Fee, because he had such heirs which were limited. But if before the *Statute* the Donee had issue, he might alien, and good then, here 4 *E.* 3. and 30. *E.* 1. which was contrary to the will of the Donor, for which the *Statute* was made, and then Fines were of great regard; yet by this *Statute*, *ipso jure sit nullus*, (viz.) as to
236. the right issue, or Donors, the Kings prerogatives are great; yet the Common Law so admeasures them,

them that they take not away any of the inheritance of the subject; and therefore the King shall pay Toll, though not for things bought, yet Toll Traverse he shall, because it is for going over another Soil, because it toucheth the inheritance to permit away over his Soil, without paying any thing, 46. E. 3. 23. H. 3. 35. H. 6. 26, 28, 29. So for to waive a Demurrer, or issue; yet may not change one issue into another Term, because then it would be infinite, which should be to the disinheritance of another. 27. E. 4. 8. *Statutes* general made in preservation of inheritances, or for the publick good, binds the King without naming, as *W.* 2. c. 5. of usurpations: but by 35. H. 6. good, is not so clear; if an infant upon whom the King usurps, hath by purchase as well as discent. So *Merton* cap. 5. That ordains, that the Kings Ward shall not pay usury, nor, That the Rent shall not be doubled during the Nonage of the Heir; and therefore in 35. H. 6. 60. by *Needham*, if the King gives land rendring Rent yearly at Easter, and if he fail to pay at the day, That he shall double the Rent; the Grantee dies, his Heir within age, he shall not double the Rent against the King: So *Merton* cap. 6. That a man shall make his Attorney for to follow his suit to the King; if it be his Lord, or at the Court of another, he shall do it; So the *Statute* of 1. H. 5. 8 of additions, *L.* 5. *E.* 4. 32. of one Law which belongeth to a common person, the King may not defend the Common right, but that every one shall have advantage; but every general *Statute* shall not bind the King, without naming of him: As *Magna Charta*, cap. 12. *Communia placita*, &c. not such which have an intent onely between subjects, and to repress disorder between them; those here which

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237. concerneth salvation of inheritance, or publick utility of the Realm. So the *Statute* of gifts Conditional binds the King, because by Justice, and Act of Parliament, the King hath submitted his will to the Donor.

The King, as *Walsh* saith, hath in him, First, power to do: Secondly, Justice to enforce him to it, this is as to others. Thirdly, Mercie to stay him from doing, this is of things touching himself. And because after this *Statute*, the King may say that the estate is Fee-simple Conditional, as it was before the Act, the case of the Tenant in Tail attainted of Treason, was alleadged in proof of it, 37. H. 8. 7. 7. H. 4. 32. which proves that the King shall be bound by the said *Statute*. So by 26. H. 8. *cap.* 13. because it is some estate of inheritance. So the Tenant of the King in *Capite*, gives in *Tenendum de capitale domino*, the King shall not have Wardship of the issue in Tail, 4. H. 6. 19. because it is not now Fee Conditional, as before the *Statute*; and therefore he is not immediate Tenant to the King; 4. H. 7. 16. The King may receive the Services of the Donor by his hands; 27. H. 8. (after *fol.* 249.) the King may take the Donor, or the Tenant in Tail for his Tenant, before Licence, or after; but once chosen shall not refort. And

238. 8. H. 4. 9. Tenant in Tail of a Signiory, alien in *Mortmain*, for default the Signiory revolts to the King, the King seises the Land after escheat, the issue in Tail hath the land by petition against the King, and therefore is not Fee Conditional as to the King, but binds the King, although in these cases the King claims in the right of the Crown, yet here it is very remote from the prerogative, because here it remains vested in the natural body of

H. 7. For

For the Plaintiff it was said, That the Prerogative of the natural body of the King, because of the union of the politick, as the attainder of *H.7.* discharge *ipso facto* as soon as he came to the Crown, 1.*H.7.4.* So *R.3.* being Feoffee to uses, when he was King the use was gone; because the King in his body politique may not be seised to an use of another, 5.*E.4.7.* and therefore it was enacted, 1.*R.3.cap.5.Rastal,* Uses 3. That the Land should be in Fee to him, to whom the Use was, 43.*E.3.22.* Franchises extinct by purchase of the King (yet to him and his Heirs) of a Mannor to which they were appendant: So the King in his natural body had another purchase, or if the purchase is before that he is King, they are not Joint-Tenants; but Tenants in common, *Fitz.na.br.f.32.G.* because no body politick may hold in Joincture: So 44.*E.3.* 239.
The King may distrain in all others lands for his arrearages, where he hath the signiory in his body politick, and by *Benlos,* no entry shall be upon the purchaser in his natural body, before he was King or after, for Condition broken by him: So 20.*H.4.47.* The King hath a *non omittas* in his *Scire facias,* for Dutchie land, and good, (before *Ed.216.*) Exception in intendment of the Act here, as good as if it had been in words, and Use is of naming of the King, when he shall be remained.

The King is favored in all expositions; because it is intended that he will not assent to prejudice himself; the liberty and interest that he hath at the Common Law, is not taken away by the *Statute,* he is not named, 12.*H.7.21.* proves it, because at the Common Law every Lord may distrain for all services in every part of the Tenancie, 10.*H.7.10.* 240.

and

and after *quia emptores terrar. m.* 3. *cap.* 2
Lord shall have *pro particula*, but not more;
the King after this *Statute* if his Tenant
part, shall have all Services by the hands of the
ossee, or Feoffor, *Fitzh. nat. br.* fol. 235. *A.* and
master's 2. *cap.* 27. which gives the Wardship
the first Feoffor, binds not the King, for he
have it; albeit he held of him by posteriority. A
Prerogativâ Regis, cap. 2. affirms the Common
in this point.

The *Statute de Religiosis* 7 *E.* 1. For *Mort*
binds not the King, nor *Marlebridge, cap.* 9.
Grants, That the elder percener onely shall
suit; yet *Fitzh. nat. br. fol.* 159. all shall do it
King. So the King may sue for debt in the
Bench, contrary to *Magna Charta* cap. 11. But
5. *cap.* 5. of additions binds the King, becau
is included in the word [Indictment] ex
which is onely the suit by (*Carus*) the King
Tail without expressing any service, he shal
Capite, 29 *H.* 8. for the King shall seize for his
if he aliens without licence, 22 *E.* 3. 58. *Ass.* fo
241. and it is not *in Capite*, if he holds of the King,
son of a Reversion, or Mannor, and not of
son, *m.* 2. cap. 3. gives receipt generally to
Reversion; yet 25 *E.* 3. 48. the King shall
received upon the default of his Tenant,
then the demandant should count anew against
King, but he ought to sue to him by Petition,
8. 3. by *Fineux*, the King shall not abase him
stand to the defence as Tenant in suit, as a
mon person shall.

Weston, Justice. A gift in Tail before *W.*
plies a Condition in Law, viz. That it shou
vert to the Donor, if the Donee did die

issue, & if the words had been expressed in the gift, it had been surplusage, and therefore there it is a condition in Law, and not in Deed; for a Condition in Deed may be broken during the estate given, but a Condition in Law, as this is, cannot, Conditions in Law are two, the one finishes the estate, as a Lease *quam diu*, one shall be Abbot, or live sole when he is removed to be Abbot, or taketh Husband, there the estate finisheth; the other finisheth not the estate untill suit, or entry, as where the Lessee maketh waste, or aliens, or Tenant in Sue Cess, or Disclaims, *v.* 2. restrains the alienation of the Donee; now after issue had, if the Gift had been to Husband and Wife, and to the Heirs of their bodies ingendred, and the Wife had survived, that her second Husband, if he had issue by her, should be Tenant by the courtesie, now this is restrained: where the estate of the Donee before the *Statute*, was Fee-simple, now by the intent of the makers of the Act, the estate is diminished and made Fee-Tail, and the Fee-simple is in the donor, and a reversion made of it; and now the Fee-simple may be given over in Remainder, and so the estate is divided. 242.

The King hath two capacities; and cometh to some things meerly as King; as Treasure, Trove, and Escheats by Treason (after *fol.* 322.) and to some, not as King; as if Lands discend to him from any of his bodies Politick, are by Pattents of the King; as Dean and Chapter, Major, *&c.* cannot purchase in succession by the word [Heirs,] but onely by the name of Successors; the body politick at Common Law, as the King here by the one or the other, the King purchases in his naturall body, yet shall not take by Livery, (before *f.* 213.)

for it passes not by Livery, but by Record, and ... Grantee thereof shall hold of him by Knights ... vice *in capite*; and none may distrain for Signi... or Rents in it, nor have execution of it. And ...
243. 4.17. The King may not be seised to another ... in respect of the Conjunction of the body Ro... to the body natural.

Prerogatives of the King, are by the Comm... Law, by Custom, and by Statute; by the C... mon Law, the Kings Grant is taken most f... ably for him, otherwise it is of the Grant of a C... mon person: As an Advowson passes not ... Grant of a Mannor, without mentioning, 2.E.3 ... 8.H.7 1. 41.E.3.4. and *Prerogativa Regis*, ca... is not, but Common Law in this point: the ... may Grant a thing in action, 2.H.7.8. and ... H.8. an Obligee Utlawed, the King shall ha... entire duty 8.E.4. 24. and 19.H.6.47. So the ... Ox (after *fol.*323.) the King Grantee of the ... avoidance, or of all presentments which shall ... pen within 20. years, and a stranger prese... them all; yet the King shall have them, and pr... when he pleaseth; otherwise, (*fol.*249.) by *A... ny Brown*: Discent taketh not away the right ... try of the King, 37.H.6.27. The King may ... after his villain, and alien when he pleaseth, ... 40. The King Counts of two presentments, ... not double, 43. E. 3. 14. of 12. Matters of ... the other ought to answer to them, and the K... shall take issue upon which he pleaseth, 16.H.7. ... by the Court, the King may Traverse a Title, ... maintain his Office if he will, 3.H.7.3. 13, 14. ... 7.13. The King may amend his Declaration ... same Term, 13. E. 4.8. The King may wave ... Demurrer, and Traverse the Plea of the ...

18.H.6.2. The King shall have a *Non omitas* in his Writs, notwithstanding any Liberty, That none shal serve his proces but his Ministers (before fol. 239.) the King shall not answer in value, without express words, notwithstanding his warranty, (after f. 334.) the King shal not demand rent, 2 H. 7.8. The King makes a Lease, rendring rent to a stranger, good, & the stranger may distrain, or have Debt when it is ended, 35.H.6.36. The King may distrain for a rent charge granted to him, or for Rent Service in all the Lands of him which ought to pay it. 13. E. 4. 6. The Title of the King appeareth, yet he is not party, the Court of Office shall adjudge for him, *Stamford, cap.29. fol.96. Fitzh. nat. br.38.E.31. 6.H.7.12.* and 11.H.4 71. by customes; the custom of *London* to retain a pledge, *cujuscunque fuerit* until he pays, binds not the King, 35.H.6 35. nonsale in Market overt, 35.H. 6.28. and Doctor, and Student, 40. nor *Wreck*, *Waife*, nor *Stray*, binds not the King, 35. H.6. 26,27. Custom, that all distresses taken within his Mannor shall be impounded there, binds not the King, 21.E.3,4. by *Statutes* which binds not the King where he is not named, yet he shall take advantage of them: As of the *Stat* of Waste, of 9.R.2. 3. of Error and attaint by him in reversion upon recovery against Tenant for life. And of *W.2.c.7.* 140. If the King as Heir to his mother, brings *Sur cui in vita*, the Plea shall not be delayed by the Nonage of the Heir; the King not named, is restrained by *Magna Charta* cap. 10. upon which 244.
Ne injuste vexes is founded for to avoid inchachment, That if the King incroach more then ought, he hath no other remedy then by Petition. The King bringeth a *Quare impedit* in the

Common Pleas, good, notwithstanding *Magna Charta, quod communia placita*, &c. 31. *E.* 3. 1. 3. 22. (before fol. 240.) Plenarty no Plea against the King, 43. *E.* 3. 14. *Non obstante*, *W.* 2. cap. 5. *H.* 8. cap. 2. Of Limitations, binds not the King. The King may not suffer a Common Recovery to Dock the Tail, as a common person may, because no precipe or Covenant lieth against him. 12. *H.* 7. 12. by Constable: So the King shall be in a worse condition then a subject, or common person to bar the issue.

Anthony Brown, Justice. The name of King drowns the Sir-name of the King, and includes it, and his proper name also: and this word of substance by it self, may not be omitted in purchases, Patents, or Writs. Land given to Henry the seventh, omitting King, giveth nothing to him, omitting his name of Baptism: So against him, by these words, in the Patent, *Rex concessit*. That the name Politick of the King, includes his natural name; and when this name is conjoyned to his natural person, it altereth the quality and degree of the person natural in the estimation of the Law: So if that he be within age, he shall be adjudged of full age, and his attainder frustrate when he is King, that the greater removes the imperfection of the Lesser (before fol. 138.) the body
245. politick hath the preheminence of the natural body as Land given to the *King* by the name of Baptism and of *King* also; as to *Henry* the *King*, and to his Heirs, this shall go in succession as the Crown, and if he dieth without issue, the Heir of the part of the mother which hath the Crown, shall have the Land also; because this name [*King*] being the greater shall have the greater preheminence in the

chase, and shall draw the land with him; So that his brother of the half bloud being *King*, shall have it; yet here the *King* shall take in such body, and in such estate and condition as the Donor limits, and not otherwise. So if a Gift had been made before the *Statute* to the *King*, and the Heirs of his Body, he had taken Fee Conditional, as another Common person, That if he dies without issue, the Donor should enter without Office. And if the *King* before the *Stat.* giveth to one, and his Heirs of his body, there the *King* shall not have the Reversion more then a Common person should have, and there his Donee might alien after issue, because the person of the *King* shall not rule the estate of the land; but on the contrary, for to make Remitter right, and possession ought to discend to one person, *simul* and *semel*, 19. *H.* 6. 59. 58 and 45. before the *Statute* after issue; the Donee might do all acts of a full Fee, because then he had full Fee and Inheritance, and not before, 5, 6, 7, and 8. *E.* 3. And the words in the *Statute* hath given *prius facta non extenditur*, intends not the Donees made by the Donors before the *Statute*, but of alienations made by the Donees before the *Statute*, and lawfully, and after issue, as a Lease for life, and release of Tenant in Tail before the *Statute*, good, and barred the issue in Formedon after the *Statute*, because it was not voidable, neither before, nor after the Act, if it was according to the power that the Common Law permitted to them. 44. *E.* 3. But the *Statute* intends as to Alienations after the *Statute* where the Gift was before. So as to the Alienation before the *Statute*, if it were not lawfull, as a woman Tenant in Tail, taketh Husband, having issue, they alien before the *Statute*; the issue shall have a For-

246.

medon after the *Statute*, that is a discontinuance to the wife, because Covert; and when she dies, the right discends to the issue; but if they have aliened by Fine, it is good, and bars the issue because there it is duly made, in respect that she is examined. 4.*E.*2. 12.*H.*4.7. before the *Statute* the *King* might not Alien before issue had, as a Common person might not, because the King could not do wrong, and his Prerogative could not alter his estate, yet the person of the *King* might alter the course of the
247. thing, as purchase of the *King* shall discend to the eldest daughter onely; but if land discend to the *King*, & another, or Gavel-kind to him and his brother, the *King* shall have but the Moity, but his Moity shall discend to his eldest Son onely, because the quality of the person may alter the discent, not the estate, be it Fee, or Tail. So that the estate shall be in the *King*, as in another (before *fol.*234.) and before issue had, the Donee could not alien, after issue he might; and this mischief, and other Acts of the Donee, the Common Law permitted to Barr issues, and the Donor, until remedied by the *Statute*. So the Common Law permits other wrongs, as a Lessee to make waste. So if one Joynt-Tenant takes all the profits of the land, the other is without remedy at the Common Law, Doctor and Student *fol.*32. So if the *King* kill a man: So disinherison of another, as here *post problem*, is a wrong suffered by the Common Law, which otherwise the heir should have had, and if the issue had not issue, then the *Donor*; before the *Statute* the *Donor* had no Reversion, yet the land reverted to him as land escheated to the Lord; neither had he a Reversion after the *Statute* of *W.*2.c.1. Yet no word in the Act divides the *Statute*, but the Construction of the

Statute

statute ex consequenti divides the estate, for to execute the will of the Donor by the intent of the act, which amounteth to so much, that the precise words and the *Statute* restrains the estate, and not the person of the Donee.

And the Prerogatives are in respect of the person of the *King*, and goes in his person, which the *King* by Prerogative, without other act, cannot enlarge; but in taking of the estate is restrained with the estate, insomuch that the act saith *Dominus Rex prædens*, &c. It sheweth that the *King* is named specially, and so bound; and when it provides remedy for the mischief, it is not to be presumed to be intended to be at liberty to do the mischief; every thing which is the intent of the donor, shall be within the Stat as plainly as if it had been expressed of other estates Tail, which are not mentioned in *W. 2. fol. 5.* Lands intailed shall not be charged against the issue for the debt of his father to the *King*, by *Anthony Brown*, who said, That it was so adjudged in *William Browns* case, which was his Father. *Puttrel*, *fol. 240.* otherwise, which proves, that the Statute of *Donis Conditionalibus* binds the *King*.

Dier, Chief Justice. The *King* onely is a good name of purchase, and is the highest name of honor, and drowns all other names of honor, and is certain enough, but not so used without his name of Baptism. And the name *King*, contains both bodies natural and politick; and Heirs, implies Heirs and Successors, and the adding of Successors is a new devise. The Donor may limit in what capacity the *King* shall take, and Tail may be to the *King* as well as to a Common person. That *H. 8.* intailed the Crown to him, and the Heirs of his bo-

dy; the will of the Donor is the effect of the Statute of *West.* 2. that every thing which is against his will, is reformed by the Act, and every thing which is his will is made Law by this Act; and therefore this Tail shall not be forfeit for Felony, *Litl.* 16. shall not be charged by the donee, 14. *H.* 8 7. *Roo* 5. *H.* 6 14. nor alien, neither shal the second wife be endowed, 46. *E.* 3. 24. nor the second Tenant by the courtesie now, 46. *E* 3. 5. and to express that in the Act is superfluous, because included in the proviso *quod voluntas*, &c. And these three Tails mentioned there, *viz.* Special, General, and Fee Marriage, are but examples, and not as containing all Tails, that his will is a law to limit other Tails, Fee after issue at the Common Law is Tail now, 12 *E.* 4. and 3. and Fee in the Donor by implication of the Act, because it restrains the Donee to the Acts of Fee, or no Fee without his properties. And therefore it shall be intended, That the Act would not that the Donee should have Fee, because it would not make an Act of Fee; and it is no Tail, because the Statute is limitted, Docked or cut off.

The King shall be bound by the Statute of 13. *de donis conditionalibus*, for that it is made in preservation of the inheritance, in benefit of the Common wealth, and in restitution of the observation of the intent and will of the giver; and in Restitution the *King* hath no favor, but the party restored in favor, as an Heir restored to a Mannor shall have the advowson without mentioning of it. So a Bishop to the Temporalties shall have *Knights Fees*, and Advowson, 5 *E* 3. 238. 41. *E.* 3. 5. and *Brian*, *Townsend*, *Davers* and *Vavasor*, who took this so or thought that the *King* should have but an estate

Tail

that otherwise the Remainder over will be inſenſible; and the Expoſition that the Deuce might alien after iſſue before the *Statute*, is *Communis Error*.

Dame Hales *against* Petit.

258. M. 4. & 5. El. in the C. P. in Treſpaſs.

1. LEaſe for years to the Husband and Wife, the Husband drowned himſelf, and ſo became a fe-de-ſe; the Wife enters, an Office is found, the Q. ſhall have the whole Term adjudged.

2. The quality of the offence is murther, becauſe it was upon malice prepenced, otherwiſe of Manſlelde, alſo it was made *Nullo ſciente, nullo præſente*.

3. It is an offence againſt nature, the Law of God, and to the King, for to kill his Subject, and deprive him of one of his myſtical members, whereof is the head, and by breaking of his peace, and for the ill example given to others.

4. He ſhall forfeit for this Felony, all Goods, Debts, Chattels real and perſonal which he had at the time of the Act done, which was the cauſe of his death, *viz.* the caſting of himſelf into the water, and the forfeiture ſhall have relation to this act done in his life, and is an Attainder in Law to that purpoſe, but not to make Corruption of bloud, forfeit Dower, or make Fee-ſimples of Lands by the Court.

5. Although the wife be remitted to the Term by ſurvivor, yet this is defeated by the office, *ex poſt facto*.

6. Where the Biſhop maketh a Leaſe for years, which is not confirmed in his life, it needs not to

be

be averred, in respect it is onely voidable, otherwise of Lessee for life, for that it shall be void by his death.

6. The pleading that Sir *James Hales* was possessed of two Leases at the time of his death, and the Office found that he had two, without saying at the time of his death, sufficeth, *reddendo singula singulis.*

7. Lessee for years to commence at *Michaelmas* brings Trespass before the Defendant gives colour by the Lease, this is not good; yet the Plaintiff shall not recover, because he had no Title.

Southcot and *Puttrel*, Serjeants for the Plaintiff. He that striketh another, after this wound given, giveth his goods to another before the death, the gift is good.

So a Constable 11. *H.* 4. 12. which arrests him, permits him to escape before the death of the other, is not a Felon; the finding by the Coroner of his death in this case, countervails an Attainder indeed, because after his death he cannot be Attainted, and he himself is the cause he cannot. A Felon of himself cannot make a Testament, or Executor, nor forfeit any thing, but that which ought to come to his Executor: Instant is the end of one time, and the Commencement of another: in Instant is priority of time in consideration of Law; Husband and Wife Joynt-Tenants of a Lease for years, there is no Moities between them, but every one of them hath the whole; and if the Husband charge the land, she after his death shall avoid it, because remitted to the Term, and in by Title *Paramount*, to the Grant, 7. *H.* 6. 1. So 18. *E.* 4. 5. Tenant in Tail gives Trees growing, and dies before they are cut down, the Donee shall not cut them, because the

259.

Iſſue and Wife are in by Title *Paramount*, the gift by *Southcot*. So 14. *H.* 4. 32. and *Fitzh. nat. br.* fol. 143. The Lord ſhall take his Ward, which is an Apprentice out of the poſſeſſion of his Maſter, for that his Title to his body accrued in reſpect of his ſeniory, which is more ancient then the Apprentice, 49. *E.* 3. 3. the Kings Tenant in *London* Deviſes to his wife for life, and dies without Heirs, the deviſe is good, as it ſeems by the Book, and yet taketh not effect until after the death of the *Kings* Tenant; and preferred before an Eſcheat to the King, yet both their Titles comes at one inſtant, but the Title of the Wife adjudged the elder, becauſe ſome part of it Commences in the life of the Deviſor; albeit it taketh effect after his death; an Obligee is a Felo de ſe, the Survivor ſhall have the Obligation by the better opinion, 8. *E.* 4. 4.

Walſh, *Chomley*, *Benlos*, and *Carus* for the Defendant. A Dead man cannot have property, for the forfeiture ſhall have relation to the ill Act done in his Life when the goods were his; otherwiſe the forfeiture ſhall be to the prejudice of others, which after his death ought to have the goods, and the law hath reſpect to the Commencement of the Act, as in 22. *E.* 3. and *Stamford* 19. one is Lunatick when he gives himſelf the mortal wound, he forfeits nothing, and it is not Felony if then he kils another, yet is of *Sane memory* when he died of the wound. 33. Aſſ. 7. *Stamford* 10. one kils his Maſter one year after he departed from his ſervice upon malice conceived when he was his ſervant, adjudged Treaſon; Felonies done by others, may be puniſhed in their life time, in perſon, Goods, Chattels, and Lands. 260.

A Felon of himself hath prevented the death by Execution and forfeiture of his Land, which Law shall not Escheat without Attainder in Deed in favor of the Free-hold and inheritance; and the only means to make him forfeit that which he may forfeit, *viz.* his Goods and Chattels is by Inquest which ought to be equivalent to the Judgement given in his life, because he took away the means of the Judgement which should have been given against him in his life, as he should have if he had killed another; and when Judgement by the Law cannot be given, the Law supplies it; otherwise as 3. *E.* 3. a Felon flies out of the Sanctuary, and will not render himself, but is killed, he forfeits his Goods, and the *King* hath the year, day, and waste, and so an Inquest there shall be equivalent to the Judgement, because he himself is the cause that it cannot be given against him; by *Carus*, my hand strikes *A.* I sell him to another; *A.* dies, he shall be forfeit.

So the *King* shall have the Goods of a Villain which gives himself a mortal wound, yet the Lord hath seised them after the wound, and before the death of the Villain. So the Attainder of the Husband in his life, shall be a Forfeiture of the Term of his wife. So this Act here; and if once Title
261. be given to the *King*. *Nullum tempus occurrit Regi*, as in 50. *E.* 3. the Husband Joynt-Lessor for years with the wife, receives money of one Attainted, which by the Attainder belongeth to the *King*; the Husband dies, the wife her self holdeth it, this found after, the *King* hath the Term in Execution for his money, as he should have had in the life of her Husband if it had been found then, and now found by office, shall relate to the life of the Husband.

Curia

Curia, this is Murther here and not Homicide, because upon malice prepenced, and is an offence against nature, the Law of God, and King, to kill a subject, and deprive him of one of his Mystical Members, as *Brooke* terms it; whereof he is the head, and by the breaking of his peace, and for the ill example given to others; and therefore Felo de se Forfeits to the King all his Goods, Debts and Chattels, 8. *E.* 2. 3. *E.* 3. 20. 36. 22. *E.* 3. (before f. 199.) *Stamford.* fol. 188. *I.* and *Stamford* Prerogative, fol. 46. 8. *H.* 4. 2. by *Tilney*, and *ex consequenti* cannot make Executors, nor have Administers, neither shall the Bishop have them, because out of the Church is no cause of forfeiture, 19. *H.* 6. 53. by *Paston*, 8. *E.* 4. 4. by *Needham*, and *Litt.* and 27. *H.* 8. 9. by *Montague*, and if he repents he is reconciled, and hath the rights of the Church before his death, yet he shall Forfeit those to the King for his offence.

But a Felo de se Forfeits not Lands, his wives Dower, nor Corrupts his bloud, 3. *E.* 3. 22. *E.* 3. (before fol. 259.) because those cannot be without attainder in Deed.

Appellee in Battail is killed, he forfeits his land, by *Arden*, and *Brown*, because this killing is equivalent to Judgement and Execution; but *Heston* held the contrary without expres attainder by Judgement for to favor the inheritance; and by *Fitz.* because the three Writs of Escheat for attainder, are (Register then 16.) *pro quo suspensus est, vel ignotus*, or *abjuravit*; if the Appellor vanquish the Appellee in battail, there his land shall Escheat, because there Judgement shall be given after that he shall be hanged, 8. *E.* 3. the husband adheres to the enemies of the King in *Scotland*, and dies there, 262. 263.

8. *E.*

8.*E.*3.fol.388. or is killed in levying War against the King, here he forfeits his Lands, the Dower of his Wife, and his bloud is corrupted, for this is an attainder in Law, 7.*H.*4.46. by *Markham* and *Stamford*, fol. 198.*a.* this which causeth the death, ought to be said, Felonlously done.

He that refuseth the trial of the Law, forfeits Goods and Chattels, as 3.*E.*3. 13.*H.*4.13. 42. 7.18. *Stamford*, fol.183.*C.* he which flies for Felony, *Stamford Prerogative*, fol.46.*A.* he that challengeth without cause above, 35.40.*E.*3.4. 20.*E.*4.5. *Stamford*, fol.185. he that taketh Clergy if he be found guilty of Felonies, which refuse the Judgement of Law, 14.*E.*4.17. he that stands mute of malice, for those are the Acts of refusal of the Law. And from the time of those which appear of Record, the forfeiture shall have relation to the wound given against the party himself for the forfeiture against a stranger, not for to be Felony, because in the mean between the wound and death he suffers himself voluntarily to escape; for if the escape should be Felony, then that escape had been Felony at the time of the escape, by *Brown*. *A.* and *B.* Joynte-Tenants for years, *A.* Grants to *C.* That if he paies 10.l. before *Michaelmas*, then he shall have his Term; yet he shall not have the Term, because the condition precedes the Grant, as 14.*H.*8. 22. by *Brudnel*, until the 10.l. paid the Joynture continues, and it is not but a Communication; but if *A.* Grant or Lease it from *Michaelmas* next coming during the Term to *C.* there *C.* shall have it against the Survivor, for there the Title is granted in deed in the estate in his life. So here this Act in his life gives Title to the King, and the office by relation executes the Title then, and the Survivor

shall

ſhall not have it from him, becauſe once attached in him; as the Kings Villain and his wife are Joynt-Tenants for years, the Villain dies, his wife hath the Leaſe by Survivor; this found by office, takes away the intereſt of the wife, as the entry of the King ſhould in the life of the Villain, and upon Ceſſer thereof, the Kings Title once veſted, is not taken away, becauſe *Nullum tempus occurrit Regi*, by Law; by *Weſton*, where Titles of the King, and of others concur in one inſtant, the King ſhall be preferred; as Land diſcends to a villain, his Lord enters after, this found, the Ideot of the King ſhall have the Land, and laches of entry ſhall not prejudice the King; yet both Titles at once in the Lord, becauſe born Villain to the King, becauſe born Ideot by relation of office to it. So if the husband be intituled to be Tenant by the courteſie, and his wife after this found Ideot, this takes away the Title from the Husband for ever, for the Heir ſhall be in ward; therefore if holden of the King, or ſhall have it out of the Kings hands, if not holden, becauſe the Title of the King to the Free-hold of the Land by the cuſtody of it during the life of the wife, ſhall take away by relation of the Office the Title of the husband, which before the Office was found, was veſted in the husband. 264.

Fiſh

Fish *against* Brocket.

M. 4. & 5. El. in the K. Bench Error.

TEnant in Tail Levies a Fine with Procla-
tions, whereof the one was recorded to be
the seventh day of *June*, which day was Sun
and dies; the issue brings Error, and Reversa
the Proclamations; but the Fine remains go
the Common Law, and shall be a Discontin
adiudged; and this Proclamation could no
made as it is Recorded, because it is no da
Court, and the Fine and Proclamations are fo
Records, and might have been avoided by Pl

Sir John Ratcliffs *Case.*

P. 6 El. in the C. of Wards.

IF an Infant be made Knight in the life of
Ancestor, and the Ancestor dies, he shall no
in Ward for his body, for by this degree he
mitted to be able to do Knights Service, and
wardship is due in respect of imbecility to do
shall not pay the value of his marriage, but his
shall be in Ward by the Statute of *Magna*
c. 4. (so if he be made Knight being in Ward
fore) the same Law is, if he be made Knight
he is in Ward, 2. E. 6. *Brook, Gard*, 42. and
the Common Law an Infant made Knight,
be out of Wardship for land and body.

Say *against* Smith *and* Fuller.

271. P. 6 El. in C. P. Replevin

Lease for 10. years by indenture from *Michael-mas* last past, the Lessee Grants, That he will 1000. Tiles to the Lessor, or a summ in gross at end of the Term; the Lessor grants, That the Lessee pays the said 1000. Tiles at the end of every 10. years from thenceforth next ensuing, That then he shall have a perpetual Demise and grant of the premisses from ten years to ten years continually, and inconsequently beyond the memory of man, and adjudged good, except onely for the first ten years, for the incertainty of the beginning, continuance and ending of the other ten years. For the second ten years begins not until the condition (which is precedent to it) be performed, for that cannot ever be performed; for all the ten years that ever shall be, precedes the payment, and the payment precedes the Lease, and so the Condition impossible. Also he cannot pay the same Tiles that were paid at first. Also the payment at a day after the Term ends, is good, because that the Lease commences from *M.* and so *M.* day is not part of the Term.

Every contract to make good a Lease for years, ought to have certainty of begining, continuance, and ending of the Term; all which ought to be known at the begining of the Lease, and if any of them fails, it is not a good Lease, because it wants certainty, by *Brown*, a Lease Conditional is good till the Condition broken, because the Estate precedes, and the Condition is subsequent. A condition to have a Lease gains not the thing, un-

till it be performed, as the needle precede thread; as he ought to marry my daughter the time limited, otherwise he shall not have 100.l. which I promised: So 7. E. 3. 308 fore fol. 25.) if he will hold over eight years to and his Heirs, shall pay twenty pounds ye Debt lyeth for the Lessor for the Rent within years; because the Lessee hath but a Term, fo Condition precedes the Fee-simple, by *Li* 81. Lessee for five years upon Condition, T if he doth such a thing within two years, he have Fee; but no law by *Dier*, because he has Fee until the Act done.

273. Referrence to time certain, is as much as e nomination of the time contained in the refer as a Lease for ten years, and so from ten to te ring an hundred years, a good Lease for an hundred years, 29. *H.* 8. So I make a Lease until shall be imprisoned by the *Statute* of *W.* 2. c So I make a Lease for years rendring 5. l. ly, and after I grant the Rent and Reversion until he hath received of the Rent 20.l. it is as if I had granted the Reversion for 4. years, cause he shall receive 20.l. in 4. years, and referrence contains such certainty from the the Lease certainly limited; for the numb years may commence, or determine upon tainty very well; as a Lease for 20. years aft the Lessee shall do such an Act, good. So f years, if the Coverture between I. S. and H so long continue, good. So 4. E. 6. (before and 13.) & 14. *H.* 8. 21. A Lease for so many as I. S. shall name, and he names so many in my life, good for so many years that my curor shall name, not because he cannot na

life, and so it is not a Lease in my life, and the certainty ought to be known in my life. But a lease until I. S. who hath Execution of a *Statute* Merchant until he is satisfied thereof, no good Lease, because *Terminus* contains certainty, and there it is uncertain how long the Lease will endure: So a Lease for three years, and so from three years to [illegible] years during the life of I. S. is good for six years only, because those only certain, and the end of the number of years intended, ought to be known at the begining.

So a person Leases for five years, and so from 5. years to 5. years during his life, is good for 10. years only; yet he continues person above [illegible] years, *Dier* said, That he knew it Adjudged.

Graisbrook *against* Fox.

[illegible] man makes his Executor and dies, the Ordinary before *Probat* commits the Administration to one which sels the goods, the Executor [illegible] his will, and bringeth Detinue against the Buyer for the Goods, and adjudged [illegible] 175. P. 7. El. in C.P.

[illegible] the *Probat* disproves, over-reaches, and [illegible] the power of the Administrator, and he [illegible] die intestate, and by consequence the pro[illegible] cast by the Act of Law upon the Execu[illegible] and the Omission of the Goods of one that [illegible] his Testament before refusall, void by [illegible] after probate by seising of the goods, bring[illegible] or pleading, &c. without Suit in the [illegible] Court; but otherwise shall it be if the

Administrator had imployed the money th
took for the Goods upon the necessary affa
the Testator, which the Executor was char
to do.

277. *Weston*, Justice, holdeth the Law with the
fendant. That at the Common Law before
19. the Ordinary had the goods of the intest
dispose in pious uses, because the Law adj
him the most ape person for it; and if he giv
alien his goods, good at the Common Law
cause he hath broken only the trust required
yet the Common Law maketh not the Ord
being a Spiritual Governor, subject to Tr
Suits of Creditors of the Intestate, but wa
clive in this point, 11. *H.* 7. 12. and 9. *E.*
But now Debt lyeth against him, by *W.* 2.
and those words there *Obligati aliquibus in*
intends all Debts that the Executor is bou
pay, by which the Ordinary shall pay
upon a Lease for years of an Intestate; but b
this *Statute* not after, the Ordinary might
for Debt, or thing in Action of the intestate
release Debts due to the Intestate, but not
the things in possession of the intestate, and
them at his will; and for this mischief 31. *E.*
11. compelled him to commit the Admini
to the next friends, and gave to them an
Debt, and not to the Ordinary himself
they were, and might be sued, and should
as Executors; yet before 31. *E.* 3. the
might commit, & such Committees shou
before *E.* 3. by the equity of *West.* 2. which
Action against the Ordinary; but Com
before *E.* 3. might not Levy a Debt, nor
Debt, because they had not to do with

(but in poſſeſſion at their pleaſure) as 7 H. 4. Executor now cannot releaſe a Debt, not for a Debt before probate of the Will, and it to him; That the ſale of an adminiſtrator is , becauſe no notice of the Teſtament is given , and the Ordinary not cannot be bound to notice of it, becauſe ſecret, as 8. H. 7. 10. 2. H. 7. E. 4. 28. and 8. E. 4. 12. and 19. H. 8. The may avow upon his anoient Tenant if the ee gives him not notice of his purchaſe, be- he is not bound to take notice. So 2. H. 4. 21. ith paid the aſſets to another, hanging the writ ſt him before he had notice of the writ, good for an Executor, and ſhall not be charged with to the Plaintiff, 31. E. 3. provides, That Ordinary ſhall commit Adminiſtration, where dies inteſtate, intends alſo, where Executors before the Ordinary, or if they die inteſtate, e there is no Executor that will intermed- by the Adminiſtrator ſhall not be avoided bate of the Teſtament, where the Ordinary authority to commit Adminiſtration in the time, becauſe there is no Executor; as a man will, That I. S. ſhall be his or, and dies before I. S. or that I. S. ſhall Executor one year after his death. So 4. H. 7. man maketh an Executor, and enters into ion, if he after is deraigned, he ſhall not avoid Acts of the Executor.

and Die holdeth the Law with the Plain- ere are three which have to do with the of the Dead, by *Walſh* viz. Firſt the Exe- appointed by the Party himſelf in whom the hath repoſed the properties of his Goods, and

confidence of the Executor of his will; and
heth Commencement by act Temporal; be
will, and it's perfection by act Spiritual, viz.
bat; if the party appoint none. Secondly,
King appoints the Ordinary, and he appoints
Administrators for his ease, and in his disch
and they have their Commencement by Act
ritual, viz. by Letters of Administration, and
as the Executor hath authority of the thing Te
poral; but the authority of the Ordinary,
Administrators, not any, except the dead di
testate; and here by not gainsaying in his
hath acknowledged the Testament; and by
if he had died intestate, the property of his
cometh by the Common Law to the Ordina
cause he had not appointed them to any, and
shall be in some body, and not in suspence, as
7. 2. by course of the Common Law; Fee
shall be in some one, and not in suspence:
dinary by the Common Law was not charge
the debt of the intestate before w. 2. for those
Obligetur de cetero implies the same, after
Ordinary is chargeable, and his Executor
11. E 3. after *west* 2. and before 31. E. 3. O
ry may commit Administration (and he
charged in action of Debt.) so *Fitzh.* seems
fol. 120. D. and 19. E 3. Ordinary pleads
he had committed the Administration to
before the action brought against him, good
the power that the Ordinary himself had,
mitted to the Administration of another,
less a man dies intestate, but when he
will; by it he hath committed all his goo
Executor, and the Law favors a Will, for
ments are of the same antiquity, as proper

280.

...s are, and is a Teſtament when the Teſtator ...d, and from thence executors, are executors, ...before *Probate*; for it is not but a Confirma- ...nd allowance of that which the Teſtator hath ... And by the Death, the property of the goods ... were in the Teſtator, is caſt and veſted in the ...ors, whereby they may give, or otherwiſe in- ...ddle with them, and may be ſued before *pro-* ... 9 *E.* 4. 47. but ſhall not ſue (before *fol.* 178.) ... 16 H. 6. 7. Executor commands *A.* to take the ... of the Teſtator out of the poſſeſſion of *B. A.* ... them, afterwards the Executor refuſes the ...iniſtration, and the Ordinary commits it to *B.* ... bringeth Treſpaſs; for the taking againſt *A.* ... may juſtifie by commandment of the Executor; ... refuſal ſhall not make the Commandment ... nor grieve him which did well at the time of ... done; which caſe argues, That the Execu- ...h intereſt in things of the Teſtators before ... And by him the Ordinary ought not to 281. ... the Executor to refuſe, after he hath once ...d with the Goods of the Teſtator; for if be- ... *probat* he had releaſed a Debt, and after he ... the Will, this hath made the releaſe good: ... *probat*, maketh the Releaſe of the Executor ... before, good, becauſe it is a conſummation of ... Will, and refers to the death.

... Chief Juſtice. If the Ordinary commit, ... after the Metropolitan commit to another, be- ... the inteſtate hath Goods of the value of 10 l. ...erſe Dioces 10. H. 7. 18. this diſproves the ...rity of the firſt Adminiſtrator, and avoids his ... Acts, and by *Keeble*, the ſecond Adminiſtra- ...hall have Treſpaſs againſt the firſt, for taking ... firſt Goods. So 7. *E.* 4. 12. Executor pleads

that he hath proved the Testament, the action of the Administrator depending against him, a good bar, because the power of the Administrator disproved, and mean acts avoided by *Probat* of the Testament, and the Executor which is made, not knowing of it, if he agree after, good, seems to be 3. H. 7. 14. The Ordinary ought to award Proces against the Executor to come in for to prove the Testament, before he commits the Administration. The Prerogative here disproves the Administration for ever, and proves the Executor to be full Executor from the death of the Testator, and is not like to the case (before *fol.* 239.) because the mean time in which no Executor, and this time the Ordinary hath authority. The Seal of the Ordinary put to
282. the administration is but matter in fact, and is no estopple, and the executor shall not be inforced to sue in the spiritual Court to recall this, but shall avoid it by Plea, or by matter in fact, as 44. E. 3. If *A.* bringeth Debt against *B.* as administrator, and sheweth certainly how his Deed was as he ought, *B.* saith, he and another are executors, Judgement of the Writ, and shew forth the Testament to prove it; *A.* offers to aver that he died intestate, if he saith to it, he shall not be received contrary to the Testament proved, and under Seal, to take the Plaintiff from his averment, but that he shall have it, and try it by the Country; also the taking of Letters of Administration, discharges not a suit against those which were executors of their own wrong (before 21. H. 6. 8. 2. R. 3. 20. So 34. H. 8. 14.) In debt by the Administrator, the Defendant received to avoid Letters of Administration, by saying the dead made an executor, and taking him sue upon it.

Chapman

Chapman *against* Dalton.

A Man makes a Leaſe for 21. years by Indenture, and Covenants with his Leſſee, and his executors, to make a new Leaſe for 21. years at the expiration of the firſt, to the Leſſee and his aſſignes; the Leſſee dies, and the Executor of the executor brings Covenant after the firſt Leaſe determined againſt the Leſſor, and adjudged, good. 284. 14. El. in the K. B. Covenant.

That the executor is an Aſſignee in Law, to whom the Leaſe ought to be made, and ſo the execution of an executor by the Common Law.

That the Leaſe ought to be made to the Leſſee if he were alive, or to his Aſſignes in Deed, and to the Aſſignee in Deed, then to his executor; and although that the Covenant be in the Copulative in the Letter, yet it ſhall be expounded Disjunctive in ſenſe, for to avoid abſurdity or impoſſibility.

Admitting that the word Aſſignee were void, and omitted out of the deed, yet this ſhall be made to the executor; for that the intent was ſuch, which ſhall be performed where the words could not.

Haber and *Wray*, argued for the Defendant; as it is abridged by *Aſh. fol.* 50. *Fleetwood*, and another apprentice for the Plainriff. Every Covenant, Grant ſhall be taken moſt ſtrong againſt the Grantor, and moſt available to the other. And if the words thereof have a double ſenſe, that which is for the benefit of the Grantee ſhall be taken; then the word [*Aſſigned*] here ſhall be drawn to ſo effectual 286. 287.

shall sense for the avail of the Grantee. And if the word [*Assignes*] as the Councel on the part of the Defendant would have it applied to a limitation, viz. in the sense of an *Habendum* to him and his Assignes for 21. years, it is void and conveys no benefit to the Grantee; because if I Lease to A. for 21. years, and his Assignes shall have this as largely as I do vest this Lease in him, and his Assignes; because the Law gives power to him to assign it to another.

Assignee hath two senses; in the one it signifies the person to whom the thing granted or given shall be afterwards conveyed by him which hath the thing; as the Lessor Grants to the Lessee for years, That he or his Assignes shall have two Carts of Wood annually in such a Wood, Assignee there hath the sense of the person to whom he shall Assign the Lease.

So one warrants Land to the Feoffee, his Heirs and assignes, there the second Feoffee shal vouch. I sell a Horse upon Condition, That if I pay 40 s. to him, or his Assignees, that I shall have the horse again, Assignee there is he to whom he grants the horse; but such Assignee is not in our case, because he hath not any estate first made, and such a one is Assignee after the thing granted; in the second it concains the person to whom the thing which is to be made, and is not made, shall be made: as I am bound to make a Feoffment, or give a horse to you, or your Assignee, there the Assignee is such a person which you shall name to me to receive; and the Assignee in this sense is before the things done or granted, and Assignes in this sense is in the first also.

228.

But with this in the first sense, we have not to do

here

there are Assignes in Deed, and Law; in Deed, where you name such a one, to whom I shall make the Feoffment, or give the horse; in Law where you name no man to receive, then the Executor shall have it, because the Law saith, That they are your Assignes to such purpose, and present your person, as to receive any Chattels real or perso-

So 27. H. 8. 3. Executor is an Assignee in Law to take a Rental, where the Lessee bound himself to deliver it to the Lessor, or his Assignes at the end of the Term, a true rental, and the Lessor made no Assignee, he is an ill expounder which confounds the Text. And therefore here [and] the Copulative shall be taken for [or] the Disjunctive; otherwise the sense will be absurd, that the Lessee if he had been alive at the end of the first Lease, should not take a new Lease until he names his Assignee; or impossible, as joyning his assignee in law with him, because he cannot have an Executor in his life. 289

So in our Law, a copulative is taken as a disjunctive, and a disjunctive as a copulative for to make words to stand with reason, and with the intent of the parties; as the Obligee shall pay 10 l. if he infeoff not him, or his Heirs, when he cometh to 7. intends (yet words disjunctive) in sense, That he shall infeoff him if he be living; and if dead, then his Heirs; because he cannot have an Heir during his life; so here, a Covenant to make a Lease at a time to come to him and his Assignes Copulatively, shall be taken disjunctively, viz. to him if he be alive, and to his Assignes if he be dead.

So (4. Mar. before 171.) A. and B. Grants a Rent Charge

Charge of 20.s. out of all lands which they shall have, the Grantee shall have several 20.s. out of both their lands; and yet the Grant was out of the lands which were to *A.* and *B.* 19 *H.* 6. 3. In lease all actions which I have against *A.* and *B.* if he hath any actions against either of them, they are gone.

So Arbitrators 2. *R.* 3. 18. may make Arbitrement of actions joynt and several, where one and two others submit themselves to their arbitrement, because it literally couples them, yet in sense goes to them severally. And so in the Common case of Indenture of bargain and sale, which Covenants to make a sure estate, or deliver evidences to the Bargainee, and his heirs within two moneths, and he dies before he ought to make the estate to his Heirs; because impossible to be performed literally, viz. joyntly, for in his life he cannot have Heirs; that thing which another doth by my authority, is my act. 290.

As if I demise, That *I. S.* shall sell my land, or authorize my Steward to demise it; or my Bayly to sell my sheep, which doth it; so it is my alienation, demise, and sale by him. So the second Executor shall be immediate Executor, and in such degree to the first Testator as the first executor was, as chosen by the first executor by force of the Authority given to him by the first Testator, which intends the same; or otherwise all contracts would be destroyed by the Common Law in a short time, viz. after the death of the first executor; because administrators could not have actions given to the intestate, untill 31. *E.* 3. *cap.* 11. proved by 10. *E.* 3. 2. the executor of an executor, because executors have not those actions by the Common Law, but

by

by *Statute*; and because by equity they were not to be extended to an executor of an executor; but the action of Debt was put in the Act in 25. *H.*3. cap. 5. not of necessity, because the Law gave it to an executor of an executor before; but for to take away the doubt that some had of it, and so an executor of an executor may have all actions that the Common Law gives to the first executor; and so may have actions of Covenants; and if not, they should have it by equity of the *Statute* of 25. *E.* 3. *cap.* 5. Admitting that the word [*Assignee*] was void, or omitted out of the Covenant; yet this Lease here shall be made to the executors; for that the intent which is the chief thing to be considered in every agreement, was such; which shall be performed so near as may be, or the words shall not be effectual; and the chief effect of the agreement, was the estate which should be made, not the person to whom: but if the Tenant bind himself, and Covenant to do corporall service to the Lord, he cannot to the Heir or executor, because it must be done to the body of the Lord; and if I perish, the thing also perisheth.

The intent performed, and not the words, good, 291.
as in the cases of *Litt. fol.* 82. That the Feoffee shall enfeoff the Feoffor, and his Wife, and the Heirs of their two bodies (before *fol.* 6.) And it is notable here alwaies, that in agreements every thing ought to be performed according to the words; for if the Mortgagee accept of another thing in another place, good, (*Litt. f.* 73.) So if the Obligee come not to the place at the day appointed to receive his summ, he hath not lost it. 7. *E.* 4. 4. but 19. *H.* 8. 12. if the Obligee sue for the penalty, the Obli-

gor

gor ought to shew that he was ready at the day
place, and say that he is yet ready. So pay
of a lesser summ at another place. (*Pok. fol.*
or before the day 10 *H.*7.14. good. So *Litt.*
upon a Mortgage, the Heir, or Executor of the
offer shall pay at a day certain; and *Litl. fol.* 76.
Feoffee of the Feoffee pays at the day, good; bec
he hath interest in the Land. So 17.*E.*3. all
the Disseisor Grants by Indenture, That if
Disseisee pales unto him 10 *l.* such a day, that
release which the Disseisee hath made to him,
be void, and before the day the Disseisor mak
Feoffment, and at the day 10 *l.* was paid to the
offee: Words performed, and not the intent,
may be in some cases, yet the agreement is not
formed, as 22.*H.*6. 10. (before *fol.* 23.) one b
himself that his Feoffees of the mannor of *D.*
Grant out of it 40 *s.* annual Rent to the Plain
he hath 3. Feoffees, and two Grants, it is no
because he intended that all should do it; for
but two parts of the Mannor are charged. So 3 *l.*
7.4. one bindes himself to infeoff me of the M
nor of *Dale*; he infeoffs an other of parcel, and
terwards me of the Mannor; he hath performed
words, but not the intent, which was, That I
have all the Mannor as then it was. So (before
22. and 23.) *si vellet inhabitare & residere*,
during the Term, intends all the Term. So 10
4.16. the words of a verdict true, yet the verdi
false, because he brought Annuity as Abbot,
prescribe so without naming of him parson
192. he had the annuity in right of his Parsonage,
Parson Imparsonee, the new Lease here shall be
the Executor of the Executor, to the use of the
Testator, because the Title of Covenant comes

him

derived from the first Testator; and that which ... in performance of the Covenant, ought to ... him in such degree as the Covenant was in ... 11. H. 6. 11. An Executor assignes Auditors ... which was an Accomptant to the Testator, ... he is found in arrearages; the Executor shall ... Debt in the Detinet onely, because the Debt ... be in him as Executor, and hath a respect to ... foundation. So 32 H. 8. and Doctor and Stu... 98. One hath a Villain for years as an exe... the Villain purchaseth hands, the executor ..., it shall be to the use of the Testator, and ... in his hands, because the Villain which was ... cause of it, was to such use. So here the Cove... which was the cause of the Lease, cometh to ... executors in right of the Testator, and to the ... use shall the Lease. The Court increases the ... here.

Osburn *against* Carden and Jay.

A Woman guardian in Soccage taketh husband, they make a Lease for years of the Land to ... Commence at *Michaelmas*; and before *Michael*... the Lessee maketh a Lease for a lesser Term of ... the Husband dies, the Wife enters, and be... ousted, bringeth Trespass and adjudged lawful. ... that the Lease is voidable by the Wife, be... she hath the Wardship to another use; and by ... of Natural affection presumed by the Law ... the neerest friend for the proximity of blood, ... that the Custody of him cometh not to the exe... *Litt. fol.* 27. The Custody cannot be given by

294. H. 7. & 9. El. in B. Bench Tr.

by the Husband, or forfeited by Usury, or [illegible] der longer then during the life of the Gu[illegible] because no such Natural affection there, [illegible] 6.55. But the husband hath interest in the C[illegible] dy in the right of his Wife, for to participa[illegible] his Wife in all matters of interest and Prero[illegible] because they are one person in Law, but lo[illegible] interest when his Wife dies, because *Cessante* [illegible] *cessat effectus*. And although Doctor and S[illegible] saith, fol. 13. That the Wife cannot av[illegible] Act of the Husband, as to give, Demise, [illegible] Chattels, real or personal, which she hath to he[illegible] uses, yet here she may, because she hath it in [illegible] thers right; and the Wardship of the body, wh[illegible] the principal, remains, which shall be maint[illegible] with the profits of the Land, and this is in [illegible] the suit of the Ward by the woman.

Caril *against* Cuddington.

295, M. 7. 8. El. in the Court of Wards.

A Woman seised of 2. acres in Fee, the on[illegible] den of the Queen by Knights Service o[illegible] the other in Soccage, taketh husband, she and [illegible] husband levies a Fine *sur Conusans de* [illegible] both; the Conusee Grants and Renders to the [illegible] band and Wife, and the Heirs of their bodies [illegible] mainder in Fee to the right Heirs of the wife; [illegible] Husband and wife die, their issue within the [illegible] of 24 years, the Grand-mother on the part of [illegible] Mother enters, and the Grand-father on the [illegible] the Father of the infant, sues as next friend [illegible] Court of Wards, because that the Queen [illegible] Wardship of the acre holden by Knights Ser[illegible] and of the body: and adjudged that the G[illegible] had

on the part of the father, shall have the ward-
of the acre holden in Soccage, as Guardian in
, and not the Grand-mother; for that the
mother by possibility may have the Land
ent after the estate Tail determined, and
Grand-father cannot; but they are in equal de-
to the estate Tail, & the wife here is a pur-
by the Fine of the Fee-simple, and the Law is
of land only, as if it were of the land, and
also.

Sherington &c. *against* Stratton.

Andrew Bainton by Indenture, Covenants and Grants with his brother *Edward*, for the affection he hath, That the Lands shall discend and to the Heirs males of their own bodies, and nue in the bloud and name of the *Baintons*; also for brotherly love and good will, That his Heirs and Assignes, shall stand seized to of himself for his life, and after to the use of *Bainton* for his life, and after to the Heirs of the body of *Andrew*, and afterwards to Males of the body of *Edward*, and adthat every of the considerations by it self, grounded upon Nature, is sufficient to raise according to the Limitation, although it without Deed. And so Covenant and Grant, will stand seized to another use by Indenwithout any valuable, or natural consideral good enough, for that the deed imports con-

300. M. 7. & 8. El. in K. B. Tr.

sideration in the Will of the Covenantor, by Hayden *Quore* notwithstanding.

Fleetwood, and *Wray* for the Plaintiff. An use
301. is a confidence annexed to the estate with which it departs: An use may be created by the Common Law, First by Transmutation of Possession, as by Feoffment, Fine, or Recovery to the use intended. Secondly, without Transmutation of Possession by one Act done, importing good consideration, which shall make the land subject to the use; as a bargain and sale, or Covenant, or Grant upon good consideration. First by a new Act done of two parts, 21.*H*.7.18. and 6.*E*.6. by bargain and sale, viz. Land for mony, or 36.*H*.8. Covenant for marriage, because advancement to the Daughter, and comfort to her parents. Secondly, where of one part onely, as Covenant for Natural affection from the Father to the Daughter, or Brother to Brother, and a desire to have the land continue in his name and posterty. For a new thing to be done by both, is not requisite by the Councel of the De-
302. fendant.

But long acquaintance, ancient familiarity, or that they have been Scholars in their youth, are considerations to raise a use; because they are not considerations of value, or recompence; as if I promise to pay to you 10. l. because you are my Brother or old acquaintance, it is *Nudum pactum*, and so note that a use was at the Common Law. A new use cannot be Created without consideration, but being created, and in *esse*, may be granted over without consideration as another Chapter and Doctor and Student, *fol.* 99. may be devised.

303. 1. *Bromley*, and another Apprentice, with

Defendant; and they Grant that there are two ways by the Common Law to make a Use without Transmutation of possession, viz. Bargain and Sale, and Covenant upon Consideration, proved by the words of 27 *H.* 8. cap. 10. and Consideration arising from the one part onely, good; and it is not requisite to have Consideration, and a new thing done by both the parties.

First Consideration.

It is natural to engender, and nourish after engendred, or otherwise the first is without effect; the Father shall have the Custody and Education of his Son, for his natural affection to him, *Litl.* 85. 33. *H.* 6. 55. and Trespass for taking away his Son, *Fitzh. nat. br. fol.* 143. and 3. *E.* 4. 12. And the Son shall have an Appeal of the death of his Father before others for his earnest intent of revenge, and his reciprocal love. So a Feoffment to the Son, a Use depending, is not Champerty, 6. *E.* 3. cap. 274. yet within the words of *Articuli super Chartas*, cap. 2. because by all Laws the Son ought to aid his Father, and so out of the intent of the *Statute*; and there by *Herle*, the Son may abet his Mother to bring an appeal of the death of her husband, and shall not answer Damages. And *Litl.* 8. The Son and Heir apparent endowes his wife *ex assensu patris*, good without Livery, because the wife of his Son is as his own wife, for the love that the Law presumes is between the Father and the Son, and within his Charge.

304.

So *Litl. fol.* 4. the Donor shall pay Rent untill the degrees past upon a gift in Free-marriage (upon another gift, not) because the Daughter advan-

305.

ced; and the husband from thence forth ... takes to find his wife all necessaries; I promise ... to one, if he marries my Daughter, he shall ... Debt for it in our Law, because the Daughter ... advanced, and so consideration proceeding ... Nature, is a sufficient Consideration in our ... 21. E. 3. all. pl. 70. Fitz. nat. br. fol. 44. a and ... Doctor and Student 105. And so the Consideration here of A.B. for provision for his issues ... good, is a good Consideration to change the ... of the land.

Second Consideration.

For the continuance of the Land in the name ... the *Saintons*, good, to raise an Use, and Males ... tinue their Sir names and Females change them ... marriage, and the Male is most Soveraign, 40 ... 37. 2. H. 4. 1. 27 H. 6. 8. and the Female, and ... inheritance, is subject to the will of another, ...

306. 4 5. I promise 10 l. to a laborer, for to repair ... way, or to a Surgeon for to cure such a man, ... have an action of Debt, because it is Charity. Doctor and Student, 105.

Third Consideration.

The good will, and fraternal love which he ... to his blood, and his brothers which is the next ... degree of blood after Parents and issues, good consideration here; and so it seems by the better opinion, in 20. H. 7. 10. but is not there adjudged ... they that joyn in blood by nature, joyn in love ... therefore if the youngest enter after the death of ... Father, the elder shall have no action against ...

con-

[illegible] to 21. H. 6. 15. by *Portington*, because the [illegible] intends that he entred as a friend to preserve [illegible] inheritance in his absence; because so near in [illegible] the Law intends as near in love. So *Litt. f.* [illegible] and 40. E. 3. 24. no discent of the Puisne, or a[illegible] his issues shall take away the entry of the el[illegible] for the cause aforesaid. So *Litt. f.* 160. Warran[illegible] Collateral Bars without assets, because the Law [illegible] that he will advance him as much as he [illegible] prejudiced him by the Warranty. So no bat[illegible] between Brothers or Cosens in a Writ of right. [illegible] *Nuper obiit* lieth against Brothers and Sisters [illegible] Gavel-kind, where their ancestor died seized; [illegible] Writ *De rationabili*, part against him which en[illegible] into all, which Writs are to try bloud onely. [illegible] Juror is Brother or Cosen to one party, a [illegible] challeng in every action; for the affection [illegible] the Law presumes the one hath towards the [illegible], 21. E. 4. 33. And *Bromley* said, That 11. H. [illegible] by *Tirwit* and *Cascoigne*, by the ancient usage, 307.
[illegible] the bloud of him which was Murthered, should [illegible] the Felon found guilty, in an appeal of Mur[illegible] by a long corde to execution, for the loss [illegible] all the bloud had by the Murther of one of [illegible], and for the revengement of his death, and [illegible] that they had to him that was killed.

Fourth Consideration.

Consideration was the Marrige had between *Ed[illegible] Bainton*, and *Agnes* his wife; Remainder up[illegible] Natural Consideration, shall preserve the par[illegible] estate made without Consideration, which [illegible] it, (but not on the contrary) if the e[illegible] upon natural Consideration precede the other

estate; as A. Covenants with B. in Consi[illegible] that B. will marrie his Daughter, to stand [illegible] the time of the Marriage to the use of him[illegible] life, after to the use of I. in Tail, afterwards [illegible] use of B. and his wife, the Daughter of A. is [illegible] use to I. without consideration; for the Ma[illegible] is private, and several Considerations for [illegible] state of B. and his Wife; because the Rema[illegible] to I. precedes the estate to B. and his Wife [illegible] if the Remainder to I. had been after the est[illegible] B. and his wives, the estate there had been [illegible] I. but money might have been given in Con[illegible] ration of all the estates. In *Mordants* case, [illegible] 7.19. No use was raised there, because the Co[illegible] nant was in the future Tense, and also incer[illegible] and therefore was put to his Writ of Co[illegible] there.

Good and sufficient Consideration, raise[illegible] Use without Deed; so a Deed raises Uses if [illegible] be any Consideration; for it is made to [illegible] fect, or otherwise should be void, because you [illegible] not have an action of Covenant here, becau[illegible] action of Covenant lieth upon a Covenant on[illegible] the preter, or future Tense, and not in the pre[illegible] Tense.

1. Contract, or Agreement for Lands, or Ch[illegible] tels, is by the Law, First, by Writing; Secondly, by Words.

First, An agreement by writing, without Con[illegible] sideration, is not *Nudum*; because a man [illegible] great consideration, and deliberation in pass[illegible] things by Deed; and the writing, his sealing, [illegible] delivery of it, signifies fully his will, is suffici[illegible] consideration, that Land shall pass as his will [illegible] and shal bind the party without thinking what [illegible]

[illegible] to do it. Secondly, an Agreement by word [illegible]out consideration, is *Nudum*, and binds not; [illegible]use words passes from a man suddenly, and [illegible]out advisement many times, as 17 *E.* 4. 4. I [illegible]ise to give you 20. l. for to make your sale of [illegible], it is *Nudum pactum*; if it be by Deed, you [illegible] have Action of Debt upon this Deed, and the [illegible]sideration there is not examinable, and the [illegible] of the Deed is not inquirable; for evey Deed [illegible]orts in it self a Consideration without the [illegible] of the party which makes the Deed. So 11 *H.* [illegible]3. A Carpenter by word, without writing, [illegible]ertakes to make a new house, and no conside[illegible]on for the making of it, is *Nude*; if it be by wri[illegible], it is good: So 45. *E.* 3. 24. for that the Plain[illegible] demanded a Debt upon a contract for marriage [illegible]ney by Deed, an action lies at the Common [illegible], because there it becometh a Lay Contract by [illegible] Deed, in Court Christian, if it had been with[illegible] Deed, because the marriage which is the con[illegible]ration, is a thing Spiritual, 14. *E.* 4. 6. 15. *E.* 4. [illegible]which books are against the opinion of *Thorp* in [illegible]said case in 22. ass. before fol. 35. *Nudum pactum* [illegible] *nulla subest causa præter conventionem; sed ubi* [illegible] *causa, fit obligatio & parit actionem.*

309.

Information for Mines.

315. THe King shall have all the Mines of Gold and
H. 10. El. Silver in the Lands of his Subjects, by the Pre-
in the Excheq. rogative of his Crown, and not by the propriety
of the Soil, although it be not recited in the Trea-
tise of Prerogative; and albeit the Oar thereof is
anothers land, toucheth others Free-holds, and In-
heritance, which is proved by three reasons; first
for the excellency of the matter, which being most
excellent, is appropriated by the Law to the person
most excellent, viz. the King. So the King hath
by the Common Law, Whales, and Sturgeons, be-
cause they are the most excellent fishes that the sea
or water renders.

So that the Treatise of *Prerogativa Regis* cap.
which saith, *Rex habebit Balenas & Sturgiones*, is
but a Declaration of the Common Law herein.
Secondly, for the necessity of defending his peo-
ple, and preserving the Common-wealth against
forreign hostility. Thirdly, for the commodity
of his Subjects, That they by the Coin made there-
of (which the King only may make) may have
between them mutual Commerce and Traffick;
because if the subject shall have gold or silver found
in his own land, he might convert it into Coin;
for falsifying or counterfeiting money, was Trea-
son at the Common Law; and for that cause, a
woman was burnt, 33. ass. pl. 2. Also it would be
316. inconvenient, That a subject which is proprietor
in the land, should have it; for that he there-

would exceed the King in Treasure, which would be perilous to his estate.

The second proofe was by presidents of three sorts.

First, Commissions, Grants, and Demises, by which the King hath Granted such Mines in others Lands, *viz.* in Annis 32. *E.* 3. 8. *R.* 2. 5. *H.* 6. 15. *E.* 317.
primo H. 7. and in some of them the King gave 318.
licence to digg in another land without licence of the owner; and where some of them saith, *habita* 319.
licentia fodiendi, which is intended land subject where they give amends for the digging, or Assign rent to the Lord of the Soil; this is of courtesie and clemencie of the Prince, and not of necessity.

Secondly, Accounts of the Grantees of such Mines.

Thirdly Informations, and Impleading of them which have disturbed the Grantees, or Imported their Oar; also the King may punish him which taketh Oar in another mans Soil. And so Charters, Accounts, and Pleas against the takers of Gold and Silver in the Soil of another, proves strongly those Mines to belong to the King by his Prerogative; for the Records of every Court, are the most effectual proofs of Law in matters Treated of in this Court; and account lies not against an Executor by any, except for the King. *Litl. f.* 28. 320.
The King may seise the Land of his Debtor which he hath, by what means, or whosoevers hands it cometh after the cause of the Debt. Sir *William Cantish* case in the *Exchequer.* 321.

The 3. proofe is upon authorities of Law, *viz.* The book called, *Exposition of Terms of the Law*; and the reading of *Hescot* of *Charta Forestæ*; and the Laws of St. *Edward* the *Confessor*, and *William*

the

the Conqueror: and so those Authorities, and said presidents, and the reasons aforesaid, for excellency of the Metal, and for the necessity and the publique good, agreeing in one, The King shall have all Mines, and Oars of Gold Silver in Land, is Treasure found. *Thesaurus terræ* taken for Gold and Silver in Land, is Treasure Trove; the use and continuance Ratifies Prerogative by prescription, although that is not be contained in the Treatise of *Prærogativa Regis* for the King; the Common Law hath many which are not there recited, as Tenant of the King aliens without Licence; it was a forfeiture before the Statute of 1. E. 3. cap. 12. 9 E. 3. 26. although it be to the preiudice of another Free-holder; because the Law gives those Mines to the King giveth to him all necessary means to have it, digging with all incidents thereunto: for every Prerogative contains in it self prescription, for is in usage; and as prescription and usage will give Title or interest to the King in the Free-hold of another, as by Prerogative the King might enter into the woods of another, and take Trees for to repair his Castles before the Statute of *Magna Charta*. cap. 22. so he might Afforrest another mans woods, before the Statute of *Forresta*, cap. 1. So 7. H. 3. he might break a Pond, and take the fish for his provision. So 27. ass. pl. 49. The King might not take his Villain (yet is his freehold and inheritance) in the presence of the Kings for it is a Protection to him for the time. So 13. E. 4. 6. The King may distrain for his Rent Charge in all the other Lands of him which ought to pay it. So the Prerogative of the King, chargeth his other Free-hold to the Kings distress.

322.

The

The King shal have by his Prerogative Mines of Copper, containing Gold or Silver in the Lands of another; because they are as a thing entire by the Commixture, & *magis dignum trahit ad se minus dignum*, 22 *H.* 6. 26. and 3. *H.* 7. 14. The Heir shall have the Charters with the Box, if it be sealed: so Carts to which Horses are tyed, if fall upon a man, the King shall have all. *Stamford* 120. (before 143.) because as one thing they together occasion his death. So the King shall have all the Obligations, and Horses where one of the Joynt-Tenants is attainted; because a thing mixt proves that the King shall have all, where Gold or Silver mixt with base mettal, by Commissions 7. *E.* 3. and 17. *R.* 2. 7. *H.* 4. 17 *H.* 6. 30. and 1 *H.* 6. proved also by accounts for Silver and base Mettal; no Mine of Copper void of Gold or Silver; no Mine of Tin void of Silver; and therefore those of *Devon* and *Cornwal*, for digging in their Land, and in other Land for Tin, and to use this to their use, derive their power from the Kings of this Realm made unto them, and giving unto such liberties as by Charter. 33 *E.* 1. confirm. 1 *R.* 2. but the power given to them for to digg in anothers Land, and to pull down houses of another, was restrained by the *Statute* of 50. *E.* 3. Derbyshire, and other places prescribes to take lead of Mines steril, which is without Gold or Silver, without paying any thing. 326. 327. 328.

On the part of the Earl against the Queen, The thing of the most in value, is worthiest; where the Quantity of Copper exceeds the Quantity of Gold, yet the lesse is the most precious, Quantity no Quantity; the Gold or Silver ought to be of more value, then the charges of separating of it 328.

from

from the base Mettal cometh to; otherwise this *quid nihil est* if he hath lost by it - *wast.* of 2.d is punishable, because *de minimis non curat Lex.* 9. 6.36. 38. *E.* 3.7. by this reservation upon the Demises, it is intended a good quantity of Gold or Silver. Also because the information shewth not what value of Gold or Silver is to defray the
330. charge which is incertain, and bad; because this is the Declaration of the King. Also Commissions are not of great estimation, but shew the obedience of Subjects, and are made at their request for whom they are granted; and many of the said Commissions and Leases were limited, That the Grantee should make to the owners of Lands in *Cornwal*, used for the digging of Tin before the said Charter, proves by the words themselves, viz. That for the amendment of our Stannaries, *&c.* and other words in the Charter; and albeit the King had some profit of Tin, or Lead in some places, as a toll dish of Oar, that was not in respect of the interest the King had, but for the bearing of the Charges of Officers, as he had of Merchants of some part of their Marchandizes, for the searchers, Controller and Waigher, because he appointed Officers for that purpose.

By those of the Earls Councel it was said, That if the Law were such that the Mines of Copper in the lands of Subjects, shall be the Kings by his Prerogative; yet here those Mines and Oar in question, pass to the Earl by the Letters Pattents of King *Philip*, and Qeen *Mary*. For as to the first Plea, they take that the vain wherein the said five hundred thousand weight of Copper was digged, could not be called a Mine at the time of the Letters Pattents granted, nor pass by the name of

Mines

for that then the vein was cloſed, and there-
paſs by the grant of the Soil as parcel of it.
In the ſecond Plea, the vein and Oar paſs by
words *Omnes & ſingulas Minerias*, &c which
no exception, and ſhall be taken ſtrictly a-
the King; for thoſe clauſes, viz. *De gratia
ciali*, which preſends great favour and boun-
wards the Patentee *ex certa ſcientia*, which ex-
any ſuggeſtion; and the Great Seal is in
of Truth, and not impugnable in Credit;
King gives a Mannor that he hath by eſcheat
chale, as intirely as *I.S.* held it, there the ad-
paſs Trinity, 43. *E.* 3. 22. (and agreed here)
not taken there but by implication, That the
is knowing of his right; and ſo the King here 331.
by expreſs words.

The King Rents the firſt Grant by his Predeceſ-
and ſaith, *Ex certa ſcientia*, (as we are inform-
concludes not the King to ſay that ſuch grant
ade by *Huſſey*, 9 *H.* 7 2. The King *Ex mero*
and *Ex certa ſcientia*, pardons to *B. Omnia de-
cumpta*, it diſcharges a debt due by him as
, becauſe there is a general pardon, 1. *H.* 7.
certain Return, and the King deceived, be-
upon ſuggeſtion, made the Charter void. As
Kings uſurp preſentations; and the King
ing one of the Uſurpations, reſtores the Pa-
ge to him, upon which the Uſurpation was,
a void Charter, but adjudged good, becauſe
tia ſcientia, in which caſe the King ſhall not
he was deceived or ignorant; 3. *H.* 7. 6. So 22.
The King grants de *De gratia ſua ſpeciali*,
Abbot of *Waltham* to be diſcharged of the
ction of Tithes, which ſhall be granted by the
gle of *England*, and Province of *Canterbury*,
not-

Notwithstanding the Grant there, adjudged good, and that the *Abbot* shall be discharged. So 36. H. 6. 34. and 37. H. 6. 31. A. Returned upon an Extent *quarto exactus*, where he was Outlawed; after the King pardons him *Ex mero motu*, and *De speciali gratia*, all Misprisions, Offences, Contempts, and Deceits, there the Amerciament is released by the general words, because the Law intends that the King is informed of the thing pardoned, as by express words in special. So 41. ass. pl. 19. The King Grants *De gratia speciali* to S. That he may give the house whereof he was seized in *Mortmain* good, yet recites not the Tenure in Burgage holden of the King, and the house was holden of the King in Free-Burgage.

332.

The third point argued by the Queens Counsell.

First by the Kings Grant *Ex mero motu*, *certa scientia*, and *gratia speciali*, Mines of Gold and Silver, or other Mines Royal, will not pass, although that it appeareth, that it was hidden at the time, and appeareth afterwards; otherwise of base Mines, for those pass, but not Mines Royal which are Collateral things to the Soil, as are hidden Treasure, which passeth not by the gift of the King; nor *Wrecks*, *Straies*, *waifs*, &c. passe not; nor do liberties pass by the Grant of a Mannor. As the King gives a mannor within a Forrest which escheats to him, yet the Donee may not cut his woods within it, without licence of the Justice of the Forrest; and the Mannor remains subject to the Pasture of Deer, and wild beasts of the Forrest; and so things collateral to the Soil, as are things of *Prerogative* and liberty, pass not by the gift of the Soil. So Livery to the Heir gives not Right.

The

The King assignes Dower to his Mother; but the King shall assign it by his Prerogative, without the Clause (*de salva* to the wife her Dower, by the King *assignanda*) and upon this reason he put the case of 31. E. 3. Three Coperceners of an Advowson, the one within age, and in the Kings Ward which Grants the ward and Marriage of him, and the Fees and Advowsons appertaining to the 333.
Ward. The King shall have all, *viz.* the presentment of the eldest and middle Sister by his Prerogative, because entire, and his Prerogative takes away the elder and middle Sisters to present. And the King hath three presentments in the Wards right; and it passeth by his Pattent; but that to which the King is intituled by his Prerogative, passeth not without express mention. A Pattent *Ex gratia speciali*, &c. shall be taken favourably to the Pattentee, *viz.* as to the thing expressed in the Pattent, which the words shew to be intended to pass; but this will not make another thing to pass not expressed or shewed to be intended by the words of the Pattent to pass. The King had the sixth Mine of Copper mixt with Gold and Silver in Land given by his ancestors to the *Prior* of *Wenlock* and there it passeth not by the Grant of the Sixth, *Ex mero motu*, &c. yet it was of the foundation of the King, and Religious favored. *Fitzh. not. br.* 332.

Secondly, by the Kings Grant *De omnibus & singulis Mineris ex certa scientia*, &c. Mines Royal, *viz.* of Gold and Silver, or of base mettal, containing in it Gold or Silver, passes not; because the King hath them *Ratione Coronæ*, not of the land, and because appropriate to his Crown, passeth not without special words; base Mines here, as those which

which consist onely of base substance, viz. Co[illegible] Tin, Lead Iron, or Coles, and not having in [illegible] Gold or Silver, and Patentees shall have thin[illegible] for Subjects; yet the terms of the Pattent com[illegible]hend things annexd to the Crown or of great [illegible]portance; but they shall be construed to pass [illegible] things of the basest degree, 22. ass. pl. The [illegible] Grants to the master of S. *Leonard*, *Omnia [illegible] tenentium suorum Feloniæ qualiter cunq; damnat[illegible]* and his Tenant kils the Kings Messenger, the[illegible] shall not have them, because intended of com[illegible] Felonies.

334. So the Kings Grant of the Return of all ma[illegible] of Writs, the Grantee shall not have the Retur[illegible] summons of the Exchequer; because it conce[illegible] the King himself there.

So 2.R.3.4. 2.H.7.7. The Kings Grantee of A[illegible]merciaments of his Tenants, shall not have the [illegible]merciament of his Tenant which holdeth of [illegible] and another; because it is before other Tenan[illegible] well as my Tenant.

Charters of the King taken according to co[illegible]mon intent, and other things which have [illegible] common intent, shall not pass from the King by [illegible] Charters. And therefore 3. E. 3. the King Gr[illegible] to an Abbot, That he and his Successors shall [illegible] quit of repairing of Bridges, Cawseys, and Wa[illegible] it discharges not him for repairing of such wh[illegible] he hath been used to repair by prescription, as L[illegible] of the Village: but it is good otherwise of a To[illegible] to which the King hath Granted Murage, Pann[illegible] or Pontage.

So 9.H.6.56. (before fol. 243.) The Gra[illegible] of the King with Warranty, shall not have in va[illegible] without precise words, but he may rebutt. So [illegible]

7.

The Grantee of the King of all Fines and Amerciaments in such a County, he shall not have Amerciaments if the Sheriff, Coroner, or other Officer is Amerced; because Royal; and a Grant shall enure for common things in intend. 43. E. 3. aff. pl. 15. The King Grants to his Son the *Dutchie* of *Cornwall*, *cum omnibus* [illegible], *Maritagiis*, &c. And one which held of the King by Knights Service, and which held also of [illegible] which was in Ward, because of Ward by Knights Service, dieth, his Heir within age, the King shall not have the Wardship of him, but the King; because a thing pertaining to the Crown shall not without special words. So the King makes a County Palatine, and giveth to another, and *Jura Regalia*, and that Pleas within the County shall be determined there; yet he himself shall sue at *Westminster*, his actions arising within the County Palatine; as 3. E. 2. For an advowson in the County Palatine of *Durham*, the King brings his *Quare impedit* in the Common Pleas; the Defendant pleaded to the Jurisdiction of the Court, and was compelled to answer.

An Abbot by the Kings Grant made to him to the amortizing of Land, or Tenements, may purchase an Advowson holden of the King *in capite*: and this case by *Wray*, differs from the case in 41. aff. pl. 19. (before *fol.* 332.) for there the Charter names the house, but names not what land; by which it cannot be intended that the King was mistaken in the Tenure, and therefore it is void there, and not for the cause of *Ex gratia* [illegible]. So 19. E. 3. he might not appropriate an Advowson holden of the King by licence to appro-

priate. So 1. H. 7. 23 and 26. A sanctuary for Treason shall not be without speciall Words, *Ex certa scientia, motu*, &c. will not pass other things then the name of the words contain. And therefore the King Grants to a man and his Heirs males, *ex certa scientia*, &c. passeth not inheritance. 28. H. 8. A Felon may not wage battell against the King, because dangerous for the King. *Stamford fol.* 180 and 181. nor against those of *London* in an appeal by the Kings Grant, 20. E. 3. So if one takes the Kings goods wrongfully, the King may seiz his goods until restitution; and 8. R. 2. if any take Toll of those of the Town of *Lynn*, they may by the King Grant take *withernam* of those another time within their Jurisdiction. And so the King conveys it from the Prerogative of his person, to the person of another *a fortiori*; he may here where the thing is not, but Revenue or profit. These words *nonobstante Petitionem Comitis*, deminisheth the force of the Pattent by *Catline*; by *Plowden*, if Gold or Silver will not defray charges, the King shall not have it, because no mettal without them; but because the party shewed it not as our case is, the Queen shall have Judgement. And this point was not put to the Judges to adjudge, because that the Defendant confessed that it contained gold, which it pretended to be of good value, because the best for the King.

Bret against Rigden.

A Man seized of 10. acres Soccage, Deviſes all his Lands by writing, and after purchaſes 12. acres Soccage, and the Deviſee dieth; the Deviſor ſaith to the Son of the Deviſee, That he ſhall be his Heir, and have all the Land that his Father ſhould have had if he had ſurvived him, and it is Adjudged that he ſhall not have the 12. acres. 342. Tr. 10. El. in the Com. Pl. Repl.

1. If the Deviſee ſhall have the Land purchaſed by the Deviſor after the making of his Will.

Manwood for the Defendant ſaid, That it ſhall be preſumed that every one knows the Law in acts indifferent; and that the Will is of no effect until the death of the party; for ignorance of Law excuſes no man; and the date and writing of the Will is not effectual, but the words of the Will ſhall be conſtrued as they were ſpoken at the time of his death.

And therefore if a man Deviſeth a Mannor in fee, a Tenancie eſcheateth, and after the Deviſor dieth, the Deviſee ſhall have the Tenancy, becauſe parcel of the Manor at the death of the Deviſor when the Will taketh effect; yet when the will made, not.

A woman Deviſeth Land, and after takes huſband which dies, the Woman dies, the Deviſe is good, becauſe ſhe is diſcovert when it took effect, as ſhe was when ſhe made her will, and marriage cannot countermand it, which was not of effect in her life. Alſo becauſe it intends no exception for

the generality of the words. As if she had Devised all her plate, and after bought plate and died, the Devisee should have all his plate at the time of her death; for the ampleness of his words declare his intent to be beneficially taken for the Devisee.

Lovelas, and all the Justices for the Plaintiff, to the contrary. That Land purchased after the making of the Will, cannot pass by the words, nor intent of the Testator, because he had not the Acres at the time of the writing and publication of the Testament; it is no presumption that afterwards he would have, and is as if he had died when he writ and published the Will; and therefore cannot have an intent to give it; and the death which is the Confirmation of the Will, follows the first Acts thereof, *viz.* the writing and publication of it; for every Act founded upon discretion consists of 3. parts.

The first, Inception, which is writing of the Testament here.

The Second, Progression, which is the publishing of the Testament begun.

The Third is Consummation, which is the same, and continues one through all these parts, or otherwise the Act is void of discretion. And

344. *Lovelas* it is proved, That the Commencement is to be considered in Wills; because if a woman Covert Devise Land by her Will, and publish it, and her husband dies, and after she dies, the Devise shall be void. So of an infant which makes his will, publisheth it, and dieth at ful age, it is not of any effect; because death without good Commencement, giveth not effect. And so the Commencement, and the intent of it is to be consi-

every act. So the Disseisee of two acres in ... releaseth all his right in all Lands in D. and delivers the release as a scrowle to be delivered the ... of May as his Deed; the Disseisor before the ... of May disseises him of another acre, and the release is delivered the 10. of May, the right as to the 3. acre shall not pass; because the first livery was ... to this intent; so the consummation of it which ... the second livery. So I have a Reversion of two ... that I. S. holdeth for life; after I purchase the Reversion of another acre which *I. S.* holdeth for ..., after *I. S.* Attourns to B. for all three, the ... acre passeth not; for Attornment passeth not ... then was contained in the intent of the first ... And so here, That which is not in the intent at the begining, Commencement of the grant, ... not be in the intent at the consummation of the ...; but if he had published his will after he had ...chased the new Land, there it may be all might ...; for by the new publication his intent shall ...taken, That all that which the words contain ... the time of the publication will pass: and by ... if a man Devise a thing by a name certain, as ... Mannor of D. or white acre, and after purchase ... same, it shall pass; for it shall be taken that ... intended to purchase it, or otherwise the Will ... be void to all intents. 39. H. 6 18. But here ... he hath 10. acres, and Devises all his Lands, ... are satisfied in passing of the 10. acres; and ... is no meaning by the words for the land purchased after the Will; because the thing is not named certainly, as the Mannor of Dale, or Whitehall. Also he may not Devise the 12. acres, because ... *Dier* the *Statute* 32. and 34. H. 8. cap. 1. and 5. ... that the Devisor shall be seized at the time

of the making of the will, because it speaks of having Lands which he may Devise; and here hath not those at the time of the Devise. Quere the case where he Devises by special name, and after purchases it, because of the word [having.]

Second point, if the Land vests in the Heir of the Devisor where he dieth in the Life of the Devisee.

Manwood for the Defendant. Because it is more consonant to the will of the Devisor, and reason, That the effect shall take place, and the form perish, rather then both should perish together: as Devisee for life (the Remainder over) dies in the life time of the Devisor, it is a good Remainder, and shall have the immediate possession, and is the effect; yet the form was for to have by Remainder. So if a Dean die, or a woman Covert taketh another husband before their Devisor dies, yet they are especially named; Land shall vest in the new Dean and his Successors, and in the woman which is now the wife of another, according to the intent, because it cannot according to the words; and if the intent of a man in Conditions shall be performed, as 4. H. 7. by *Fox*, he ought to infeoff the survivor and his heirs onely where the other dieth *a forfeiture*; the intent in Wills shall be observed where the words cannot, and the effect 345. here is that the Heir shall have the Land, and not the form of the limitation, that he shall have it by discent, 21. R. 2. Remainder *Ecclesiæ Sancti Andreæ* in *Holborn*, good. And *Parson* shall enter because it was comprehended in the Devise, though he was not named.

Lovelace, and all the Justices besides *Walsh*, to the contrary. For by the death of the Devisee, the Devise is countermanded, for that the Devisee is not

...*rum natura*, when the Devise took effect; and ...ll gifts, be they by Devise or otherwise, there ...e to be a Donee in *esse* capable when the thing ...t to vest, or otherwise the gift is void, and the ...d Heirs limits the estate, and not the persons ...ch shall take, and enables the Devisee, as well ...lien, as to permit it of Discent; for a Dis... to the Heir is but a thing subsequent to the e... of Fee-simple first vested in the Devisee, and ...ng at his pleasure. And things of sequel which ... if the estate had been vested first, (as are Dis... Dower, Escheat) are not good causes to make ... vest in others then those to whom limited. ... therefore the heir shall not have the land here ...ore then the woman shall have dower, or Lord ...eat if he had died without heir, which should ... if it had vested in the Devisee. And therefore ...man Devise a Lease or goods to I. S. which ...and afterwards the Devisor dies, the Executor ...8. shall not have them.

...e speaking to the Son of the Devisee, That he ...be his heir, *&c.* is void, for that the *Statutes* ... and 34.H.8. gives licence and authority to ...man to Devise his Lands by his last Will ... Testament in writing, and those are sufficient ...emselves for to make the thing devised pass, ...not regard words without writing, by all the ...ces; but if he had published the Testament of ... the Devisee should have the 12. acres in this ...for that it had been as it were a new Testament ...not his heirs.

Delamer *against* Barnard.

348. 10 El. in K.B. Tr.

A Man in 25.H.8. makes a Feoffment to the use of himself and his wife in special Tail, Remainder to the husband in general Tail, Remainder in Fee to the brother of the husband, and after 26.H.8. The husband maketh a Feoffment to which infeoffs the Brother, being in Remainder in Fee. 2.E.6. The brother infeoffs the Defendant, the Husband dies, the heir of the first Feoffee enters to revive the use to the Wife, and adjudged lawfull.

1. By the Feoffment of the Husband in 26.H.8. all the estate of the Feoffee to use, is drawn out of him, and setled in the second Feoffee, and by consequence all the uses which were created out of the first Fee-simple, are discontinued, and shall not be revived untill a re-entry of the Feoffee after the death of the husband, and that he may enter notwithstanding the Feoffment of the Brother.

2. The Feoffment of the Brother in Remainder is not warranted by the *Statute* of 1.R.3.cap. 5. that he hath not use in possession, nor in *esse*, but only a right which he could not grant; neither can it be executed by the *Statute* of 27.H.8. but only may pass by Livery by way of Extinguishment. So the *Statute* of 1.R.3. extends to *cestui que use* in possession, and not in Remainder, or Reversion where they are derived out of one entire estate created by Feoffment; for although that the uses be several, yet the estate is entire, which shall not be divided; but he may make a Lease for years,

ence after the particular estate determin-
which is Executory, and divides not the estate;
where the estate and uses also are several, as a
e for life to the use of one for life, and the Re-
on granted to another for life, to the use of an-
for life, &c. There he in Reversion may grant
Reversion by the *Statute* of 1. R. 3. for that
in possession by reason of the severaltie of
Cestui que use by the Common Law cannot med-
with the Land; for if he doth, the Feoffee may
sh him in Trespas. And if the Feoffee will not
Cestui que use for to receive the profits, he
no remedy but in the Court of Conscience; for
nd was so fully to the Feoffee by the Common
, as if no use had been of it. And by the *Sta-*
of 1. R. 3. cap. 5. *Cestui que use* in possession
y may meddle with the Land for to make Fe-
ent, Lease, &c. and the Feoffee is onely sei-
of the whole Fee to the use of Tenant for life, 351.
in Tail during his life, or the estate Tail, 4. H. 7.
And the Feoffment of *Cestui que use*, or in
ail, or for life, is warranted by the *Statute* of 1. R.
nd pass the Fee until a Re-entry both by the let-
and intent of the *Statute*; for if a woman
overt was *Cestui que use*, the husband might
ke a Feoffment, and good during Coverture by
intent of the Law, and the *Statute* which giveth
the husband during Coverture direction of the
ings of his wife; and yet the claim of the Feof-
s were not onely to his use but to the use of him
nd his wife, 6. H. 7. 3. So two joynt *Cestui que uses*
Fee, the one maketh a Feoffment of the moity
the Land, and good, and binds the Feoffees, yet
ere not onely seized to the use of him, but by the
in-

intent of the *Statute* hath a moity of the Use presently; and may give, or Lease the moity of the Land where the estates are several, and uses of every part granted by the *Statute*, or several uses issuing out of one estate, the several possessions of several uses, may not divide the estate, because there entire; yet there *Cestui que use* in Remainder in Fee may make a Lease for years to Commence when his use shall be executed, because then the Lessor shall have interest in the possession; and the Franck Tenement of the Feoffees shal not be taken away, nor their estate will be divided; but an estate for life, or greater, he in Remainder cannot make without the dividing of the estate, or taking away of the Free hold, because it passeth presently, and is not executory as a Lease for years is, if the Feoffees to use makes a Feoffment, upon Consideration, or not, to one which hath notice of the first use; otherwise if *Cestui que use* maketh a Feoffment to such a person upon Consideration with notice, or without Consideration and notice, there all the first estate, out of which all the uses do rise, is taken from the Feoffees, and a new estate is made by authority of the *Statute*, the which new estate shall be to uses newly expressed or intended, and not to the first use; but by this all the ancient uses are discontinued; the reason seemeth to be before that one
352. use cannot be raised out of another. The release of *Cestui que use* to the Disseisor of his Feoffees, good, and bars them of entry, 14.H.8.7. and 27. H.8.29. a Disseisor infeoffs *Cestui que use*, which infeoffs a stranger; by this the right of the first feoffees is gone, although that no use was in *Cestui que use* at the time of the Feoffment, as if *Cestui que use* had released to the Disseisor: But *Plowden* saith,

That the greater doubt will be here, if
the Tail was here determined if the first Fe-
might enter, because the right of the use in fee
extinguished by the Feoffment of him in Re-
mainder; But here for that the particular estate in
continues, which may not be defeated by him in
remainder, this is good without doubt; by some
entry of the first Feoffee shall gain the fee sim-
by the discharge of the use in Fee to himself, for
it was extinct in the possession of the last Fe-
as of a rent which he in remainder had in the
before his feoffment; this shall be extinguished
Land by his Feoffment; so of the use, and
there the entry of the first Feoffee shall revive
use in Fee simple to him in Remainder which
the Feoffor, for that they could not have this
time of the Feoffment made, because not in
was discontinued at this time by *Cestui que*
possession in Tail; and by *Plowden* and
ley, he shall revive the use in Fee to the last Fe-
for that this passeth to him by the Livery, and
first Feoffee hath nothing in the Land to his
use, but only to the use of the Feoffor. And
was not his intent that the first Feoffee should
it to his own use, but that the second Feoffee
have it, and so by his re-entry he shall revive
use to the last Feoffee by the course of the Com-
Law; for that the last feoffment was by the
mmon Law, and not Warranted by the *Sta-*
of 1. R. 3. for the cause aforesaid; but this
was left at large; and if before R. 3. *Cestui a*
que use disseises the Feoffees, and infeoff others up-
which the first Feoffees to use enter, they shall
ssed to the use of the last Feoffees, because *Ce-*
stui que use had given his interest to them; and his
ent appeareth that they shall have it, and the first

Fe-

Feoffees shall not hold to their own use; because it is a Collateral thing annexed to the person passing the Land, and not as a Rent issuing out of it. And use is but confidence, that the Feoffees to uses shall do for the Feoffor as he would do if himself were seized; and so it is a difference between a use and a Rent, which Rent is only by reason of the Land, but use also is annexed to the person.

Stowell *against* Zouch.

356. H. 11. El. in the common Pleas Entry sur Disseisen.

Disseisor Levies a Fine with Proclamations, the Disseisee dies after three years, and within the five years his Heir being within age, the five years incur after the Heir commeth of full age, and within one year after his full age enters. It is adjudged that his Entry is not lawfull; but that he shall be barred by the Fine with Proclamations, and the five years notwithstanding his Infancy, for that the five years are once attached in his Ancestor, and then they ought to incur; for the pursuit of a Claim within five years, is a Condition in Law which shall bind an Infant.

357. Those which argued with *Stowell* for the better intelligence of the Statute of 4. *H.* 7. *ca.* 24. which gives five years to every Stranger, and of the reason of making it, thought the Fines, and their force at the Common Law and the incidents thereof, which consists in three points:

1. The nature of the Fine, and the puissance of it.

2. The preservation of the antient right by Claim.

3. What persons may make the Claims.

1. Fine

Fines are as antient as any Court of Record, and at the Common Law, they bind all strangers but those which have defect, which Enters or Claim within a year by 17. E. 1. So Nonclaim, after the year and day, was peremptory upon a Fine or Recovery in a Writ of Right Executory and not Executed, as is a Fine *sur Conusans de droit* and Render. 7. E. 3. 335. Because translation of Possession gave occasion to a stranger to take notice, and to bring his Action or enter within the year and a day after Recovery in Right, levied by Battail or great Assise barred a stranger, who had not defect as Nonage was for the great notice of it, because publike and more notorious than in other Actions: And a Proclamation shall be made before Judgement upon a Recovery in Right, by default for to give notice of it: And from hence use is derived to make Proclamation in Guyldon, as it is in 7. H. 4. 19. upon the con- 358.
firming of the Action. *Quære*, by what Law; and Fines after Recovery in a Writ of Right was of greatest force.

But the avoyding of a Fine by one, defeats it against all, although their Right was bound before by their Nonclaim, which sets at large all other Rights above them, although they make not claim within the year and day. 16. E. 2. As if the Lord defeats a Fine at the Common Law by deceit, he restoreth the right to him which Levies the Fine. And if the state which passes by the Fine be defeated, the right Paramount is restored, although it was barred before by Nonclaim. As the Feoffee upon condition if an Abator levies a Fine, one year after descendeth the Heir, is barred by Nonclaim, the Abator enters upon the condition broken, the Heir

now

now shall have *Mort. d'Ancestor* against him
and after the Statute of 4. H. 7. an Action brought
within five years shall defeat the Fine against him-
self, and all others having right Paramount, al-
though he hath not Judgement and Execution until
359. seven years after Proclamation. Claim is defined
by *Dyer*, to be a Challenge of the Ownership or
Property, that he hath not in Possession, but is de-
tained from him by wrong. There are four Claims
for defeating of Fines; whereof two are by Re-
cord, (*viz.*) Action Reall, and Entry of the Claim
at the foot of the Fine, two by Acts in the Coun-
trey, (*viz.*) by Actuall Entry and by Claim, and
so notwithstanding, the Puissance of Fines at the
Common Law, the Law hath provided those
Claims for to preserve the Antient right.

3. Those which are strangers to the Fine, and
have present right, ought to make Claim, and shall
avail all in Remainder or Reversion, & their Non-
claim binds all in Remainder and Reversion, be-
cause all of them have but one year by the common
Law after the Fine levied: And such mischief
was a great cause why the Statute of 34. E. 3. ca. 16.
which out Nonclaims was made. But before
this time, *W. 2. ca. 1. 13. E. 1.* hath provided for the
Donor and Donee, that Nonclaim shall not bind
them, as it did before 13. E. 1. as it is like. But an
Infant was not bound at a time certain to make
Claim by the Common Law. It is proved by
Implication of the Statute of *W. 2. ca. 1.* and 18. E. 1.
de modo levandi fines; observe in their Exposition,
because he hath not discretion to consider of his
right, nor to conceive what Action he shall bring,
nor when, or how to Enter, or Claim, or to do Acts
which require intelligence; and in the same degree

Non-sane, a man in prison and beyond Sea. But 360.
woman Covert was bound to make Claim by
Common Law, because she is not mentioned
any of the Acts, and hath a Husband which
may make Claim for her. And therefore Infants
such are at large always, and bound to no time
to make their Claim by the Common-Law.
if the Father Disseisee dyeth within a year
day after the Fine Levied, before the Statute
Nonclaim, his Heir within age, he need not
Claim, because he is not bound where the
discends to him, more then he is when he
a present right when the Fine was levied;
Infant in Remainder or Reversion, is not
by the Nonclaim of the particular Te-
And so howbeit that Fines at the Com-
Law were of so great force, yet the fot-
right was considered, and time given for to
ve it, and Infants were exempt out for this
And after, when Nonclaim was repealed
outed in Fines and to make their Claims, and
ause the Law was unreasonable that those
Remainder or Reversion should be bound
Nonclaim of particular Tenants; and the
of Nonclaim being outed in process of time,
became too feeble, and were in effect but
finements of Record, whereby the security of In-
tance was taken away, which was cause of great
tention between Subjects; and therefore the
ute of 4. H. 7. intending to reform three things;
rst, to magnifie Fines againe.
econdly, to preserve the Ancient Right, if it
ursued within a certain time.
hirdly, of not binding of persons of defect,
feme Coverts) unless they are also parties to
the

the Fines; but favoured those which had
until their impediment removed, and then
them time sufficient to pursue their right.

361. That which is excepted out of the Act,
of the provision of the Act, and there is no
nance for it; but is so apparantly exempted out
the Act, as if no Act had ever been made.
a Feoffment of a Manor except an Acre,
all Lands in Dale except White Acre, is void
those Acres, as if no Feoffment had been
but a saving goes to them touched and not
exempt.

362. The word [*having*] in the Statute of Fines
shall be expounded of them which have right
time of the Fine Levied, and Proclamations
and also of the using of the Action or Claim
And not only at the time of the Action or
The exception goes not but to those before
The ampleness of the Exception is measured
the ampleness of the Purview. And there
Stowell, if he is bound by the Purview, he
terwards excepted; and if he is not bound by
Purview, he needs not to be excepted, and
is at large and out of the body of the Act, w
consists of the Purview and of the Except
Acts of Parliament are positive Laws, consis
of Letter and sence, which together make
Law. And the Common Law is ancient to
positive Laws; and this is to be considered
come to the sence of the positive Law, *viz.* to
such sence to the Letter which excludes all
chiefes and inconvenience. Those which Le
Fines are Parties, their Heirs are Privies,
cause there is privity of blood between the
Strangers are they which are not Parties to

Fine nor privies:) And the Fine excludes now Privies, by 4. *H.7.* before not Parties here; and therefore it is no Mystery, that the Letter of the Act will extend to them; no Laches untill all the time is past: Because they have Election to protract time, untill the last of the five years, or last day; so that they within five years pursue, intends Heirs: also of those of full age, for such sence stands best with equity & reason, which most avoids rigor and mischief. Things within the Letter, and yet out of the sence and intent of *Statutes*, as 36. *E.3.* and 4. *H.7.7.* Doctor and Student, 148. An Infant named a Disseisor, vouched a Record and failed, he shall not be imprisoned: Notwithstanding, *w.2.* ca. 25. Nor an Infant Baily or Receiver found in arrange of account, shal not be committed to the next Goal: Notwithstanding *w.2.ca.11.* Nor an Infant which is convict of Ravishment of another Ward, shal not be imprisoned for the Kings Fine: notwithstanding *Merton*, Cap.6 Nor if a woman Infant be Ravished, and consent to the Ravisher, within twelve years, there the Heir shall not enter: notwithstanding, *R.2.ca.6.* But Infants are bound by Laches for a Title, & favoured for the Inheritance, as Doctor and Student, 148. An Infant shall be bound by Cessavit or Waste, because an injury done by his Act, and he shall purchase, and the Law will presume if he hath policy to get a thing, that he hath reason to defend himself: So if an Infant Lord enter not for Mortmain within the year, before a Villain hath sold, because he had but title to the thing, that it was never in him. But Doctor and Student, 29. and 27. Assises, 32. Laches of Entry upon Discent or Warranty, binds not an Infant, because they have favour for Inheritance,

364.

for Waiſe, Stray, Wreck, or for Goods taken from them, and offered to Images, or taken by Enemies, and not retaken before the Sun ſets; or ſold in a Market Overt, or Acts an Infant as Executor 35. E. 3. 45. or as King, before 213 or for neceſſity, as an Obligation for meat, and drink, Doctor and Student. 104. The Common Law is the foundation of this Act of 4. H. 7. and if the Father dies within a year after the Fine, his Heir Infant is at large, (fol 372. otherwiſe,) & the imperfections which may happen ſometimes within five years are to be conſidered, as thoſe which are at the time of the Fine or right then: And becauſe that the *Statute* provides for the Infant in the exception, and in the Fine, it will not be amiſs in the middeſt: And if one which hath a future right dies within five years his Heir within age, ſhall here five, *à fortiori*, he which hath a preſent right (as here) becauſe it is of greater eſtimation then a future. If a ſtranger to a Fine cometh of Non-Sane memory, or is in priſon the third year after Proclamations made, and after the five years cometh of Sane memory, or out of priſon, he ſhall not be concluded, becauſe conſtrained and acts involuntary; but if he or ſhe taketh Husband, or go beyond Sea in the third year, and after five years is diſcovered, or within the Land, he ſhall be bound, becauſe Acts voluntary. An Expounder which adheres only to the Letter of the *Statute* of 4. H. 7. without adding reaſonable ſence, will admit many abſurdities, as by the Letter of the *Statute*; if an Infant which hath preſent right & is excepted, dies within age, his Unkle being his Heir and of full age ſhall be barred. So if an Infant by Entry within age avoyd the Fine, & after full age, permit the Conuſ-

365.

366.

for five years in poſſeſſion without Claim,
ſhall be barred by the Letter, which ſaith that
ſhall take Action or Entry within five years af-
full age. So an Infant being Diſſeiſee in his
mothers belly when the Fine was Levied, is not
ed by the Letter of the Act (becauſe his age
counted from the time of his birth,) by intent
Act here, for every thing which is within
intent of the makers of the Act, although that
not within the Letter and intent alſo; and of
exceptions, the Letter binds none to five years
full age, which were within age when the Fine
Levied and ingroſſed, and many years may be
een the one and the other; yet he that is born
the Fine levied, and is within age when it is
ſſed, goeth not at large, but is bound to five
after full age, as well as he which was born
fant when the Fine was levied and ingroſſed:
if the Diſſeiſee at full age when the Fine is
, die, before the Proclamations, his Heir
n age then, and when all the years paſs, is
d by the Letter, becauſe the Letter excepts
which hath right when the Fine is levied.
the intent of the Exception, intended to ex-
thoſe which had right, and are Infants when the
years commence; ſo it ſhall be if the Diſſeiſee
th of Non-ſane Memory, or in priſon be-
the Proclamations, and after five years he
h to ſane Memory, or forth of Priſon, he ſhall
five years after this by the intent of the Ex-
ion.

Two Joint-Tenants Diſſeiſes, the one within 367.
the Diſſeiſor levies a Fine, four years paſſe af-
the Proclamations, he of full age dies, the In-
ſhall have other five years after his full age for

all, by *Bendlos*, and severall five years shall be for severall Titles. As *A.* disseiseth a woman sole taketh her to wife and have Issue, *A.* is disseised and dies after a Fine levied by the Disseisor, and before the Proclamations, the Issue being of full age, after the Mother dies, the fifth year passe, the Issue is bound as Heir to his Father; because in this respect, he hath but five years together. But as Heir to the Mother he shall have five years to be accounted from the death of the Father; for notwithstanding it is the self-same Land, he hath severall rights, the one the last as Heir to his Father, and th'other the first right as Heir to his Mother. And in respect of them hath severall times, as the Husband maketh a Feoffment of the Land of his Wife, upon the condition which is broken, the Feoffee levies a Fine, the Husband dies in the fourth year, after Proclamations having Issue by the Wife, after the Wife dies, and five years passe, the Heir is barred to enter as Heir to the Father for the Condition, but shall have five years from the death of his Father as Heir to his Mother for her right, for the cause aforesaid, by *Saunders*. *Ireland* and *Scotland* are severall Realms; But *Scotland* was holden of the Crown of *England*, and was within the Fee and Signiory of the Crown of *England*; and he which is in any of the two Realms, shall be said out of the Realm, and shall be within the Exception of 4.*H.*7. So Ideots, Lunaticks, and they which have the lethargy shall be comprehended in the words of Non-sane-memory, as well as Madmen.

For *Zouch* Peace, which is the end of all Laws described, and the necessity and benefit thereof; and those Laws which carrie most peace,

most estimable. And the *Statute* which Outs
claim, was to the universall trouble of all the
; for the avoyding whereof, and to make
to have their antient force, the Act of 4. H. 7.
made; and the Preamble of it is to be con-
ed, because it is a Key to open the minds of
Makers of the Act, and the mischiefs that they
aded to remedy; and the preamble shews that
Makers of the Act were of Opinion, that Fines
to be of greater force for to avoid contenti-
then they were before the *Statute* of Non-
and now is used to the contrary, *viz.* to the
all trouble of the Kings Subjects, and
re they were Enemies to former rights, be-
that stirred up many Suits, and made the
strongly against it, *Et lex si prohiciat ma-* 370.
ti utilis est. All Infants are bound by the
Purview which containeth them in the
tions; As an Infant levies a Fine, Procla-
ns pass, he shall not have error; yet within
no Infant is excepted: But he that is not
to the Fine by *Southcot* and *Walsh*, he is ex-
out of the generall Purview, in the intent
Makers of the Act. And *Stowell* the Heir is
hin the Purview nor Exception of the *Sta-*
for that he had not right at the time of the
levied; but then the right rested in his An-
which was disseised; for the Exception is
an exemption of that which is contained be-
in the generall words, otherwise could not be
ed: As a Feoffment of a Mannor, ex-
ch an Acre which is not parcell of it, or a
of all Lands of the part of the Father, ex-
lands of the part of the Mother, is a void ex-
n, because this exception was not in the

Feoffment, nor Demise, or right, or not right, [illegible] not the matter; but claim, or Nonclaim within five years is the matter where a Fine is pleaded to conclude any. And this Tried by issue by the one or the other maketh an end of the matter.

Catline, a Writ of deceit by the Lord in ancient Demeasne made 20. years after Proclamation upon a Fine Levyed by his Tenant, shall make void the Fine, and the Tenant shall be restored to the land because he claims signiory, and services out of the Land, and no right to the Land when the Fine was levyed, and therefore is out of the purview which extends not from whom he claims, or had right possession, Reversion, or Remainder to the [illegible] comprised within the Fine, when the Fine was Levyed upon matter rising before. The first saving giveth five years after proclamation to those which have right, and their Heirs, with a Condition annexed to it, viz. so that they pursue their Title,
371. Claim, &c. within five years after Proclamation, and as the saving is general to all Heirs, notwithstanding they have their imperfections of Nonage, Insanity, &c. So is the Condition general, and extends to all Heirs whatsoever they are; and this was the cause of the Judgement; for otherwise the saving shall be for all heirs, and the [So] shall be of all Heirs within age, and then the [So] is not so large as the saving. And so the Heir within age is bound to the Condition of the first saving, as well as he is saved in the same, because general tranquillity is more favored then an Infant, and no right shall be gained by exposition, or equity, beyond the words of the act, where the Act as here strains all men to a time certain for the com-

quillity of the people; and Infants had been
by the general purview of 32. H. 8. c. 2.
they had not been excepted there: And there-
if one of the Terms limited by 4. H. 7. be
adjourned (becauſe the *Statute* ſaith, then next
ing) all the Proclamations before are void,
the *Statute* of 1. *Mar.* Cap. 7. *Raſtall, Fines*, 12.
cauſe time limited by the act, ought to be purſu-
and once attached in part, ought to be conti-
. So the 5. County upon Exigent ought to
the next to the fourth, or it is diſcontinuance,
Allocatur *Comitatus* ſhall not aid, but is ex-
And therefore an Infant at the Common law
ll be bound to year and day (otherwiſe f. 365.)
re by the *Statute* of 4. H. 7. The five years
ommence in the father, being of full age, Non-
n within the time limited by the Common
, ſhall loſe right, and infancy there ſhall not
the party, as 7. H. 6. 32. Nonclaim by the Lord
his villain by a year and day, which hath fled in-
ancient Demeaſne. So 15. E. 4. 6. Nonclaim of
rtles before Juſtices in Eire. So wood of ano-
within a Forreſt of the Kings, ſeiſed into the
ings hand, ſhall be forfeited by Nonclaim within
year and day (before fol. 57.) So if a Baſtard 372.
ſeiſed, and Maller claims not. So 2. H. 7. 10.
ſhall loſe his appeal of Murther if he bringeth
not within the year and day. So by the cuſtom
ſome Mannor, one ſhall loſe Copy-hold if he
ims it not within a year and day after the death
his anceſtor *a fortiori*; time ſhall be preremptory
here it is limited by the *Statute* for the common
nefit of the Realm, which ſhall be more favored
n the private profit of any ſingle perſon, be he
fant or *non ſane memory*, &c. by *Carus* and *Dier*,

the right of a Mulier within age, is bound by a
cent of the baſtard, becauſe the Law in this caſe
binding Law, by *Southcot* and *Sanders* cont
becauſe Infancy ſhall excuſe Laches of entry, 3
18 & 22. 36. aſſ. 2. & 33. B. 3.

The ſecond ſaving giveth new 5. years to o
perſons, and here *Stowel* is the ſame perſon w
had five years with his anceſtor by the firſt ſavi
becauſe the ſaving, and the [*ſo*] is in the Co
tive, and the word [*others*] is excluſive of
compriſed in the firſt ſaving, and the excepti
And becauſe he is heir, and ſo within the firſt ſa
ving, he is excluded out of the ſecond ſaving by
word [*other*] by *Walſh* and others; if a Fe
for the life of another, the Remainder to B. for
life, the Remainder to A. in Fee is Diſſeiſed,
Diſſeiſor levies a Fine, and five years paſs
proclamations, if he for whoſe life and the
mainder for life dies, he ſhall have new five year
becauſe it is another eſtate, and the firſt remai
to him; but by *weſton* and *Catline* otherwiſe, be
cauſe not another perſon; alſo this right which
Diſcends to *Stowel* here, is not ſuch a right as
Statute intends to give new five years by the ſecon
ſaving for a new right, for it was once right in
Anceſtor, and given to him before. And the wo
[firſt] is of great purpoſe put into the act, and
word [joyn] as it ought to every of the words ſub
ſequent, *viz.* Accrue, Remain, Diſcend, or Com
excludes *Stowel* of the benefit of the ſecond ſavi
and 1. R. 2. cap 7. touching Fines hath all the wo
of 4 H. 7. touching the purview and body of
Act, but the word [Firſt] which is added to 4
7. as a thing thought very neceſſary, and ſo he th
will take benefit of the ſecond ſaving, ought to pur

four

ings, 1. That he is another person. Secondly, the right first came to him. Thirdly, and became after the Fine ingrossed, and Proclamations made. Fourthly, That his right is before the Fine levyed, as where right or Title shall first come. And therefore if the elder brother be profitted when the Father died seised, and the youngest disseised at the levying of the Fine with Proclamations, and five years pass, and after is deraigned, shall be aided by the second saving for the cause aforesaid. So if the Disseisor of a Mortgagee levies a Fine with Proclamations, & five years pass, & after the Mortgagor pay or tender the Money, he shall have years after his payment or tender, because his Title first accrued after the Proclamations by the payment or tender by matter before, *viz.* the contract. *Plowden* seems, that he is at large, and not bound to five years, because at the time of the Fine levied no wrong was done to him, nor to the estate which he claims. So a husband levies a Fine with Proclamations, and after the five years past dies, and from thence by this second saving, his wife shall have five years to sue out her Writ of Dower after Title accrued by the death of her husband, when cause before the Fine, viz. their inter-marriage, and seisin of her husband, by *Plowden* she is at large and not bound to five years, because it was a real wrong done to her at the time of the Fine, therefore, because her Title accrued after the Fine, viz. by the death of her husband. So Tenant ceases one year before the Fine, and another year after the Proclamations, the Lord is at large to have his cessin 20 years after, for it is not within the purview of the Act, because he had not Title at the time of the levying of the Fine; but it accrued afterwards,

terwards, viz. to the end of the two years where it should remain as to the Donee, & to his heirs males of his body. (Remainder to his Son in Levy a Fine with Proclamations, and die, the Son shall have five years. So Tenant for life, Remainder in Fee Levies a Fine with Proclamations, and dies, then the Son shall have five years. So Tenant for life, Remainder in Fee is Disseised, the Disseisor Levies a Fine, and five years pass, and Tenant for life dies, he in Remainder shall have new five years: Tenant for life, and Feoffee Levies a Fine, five years pass, entry or Forfeiture is gone; but there by *Walsh.* he shall have a Formedon after the death of the Tenant for
374. life if he sues it within five years, (by *Catlins* otherwise) because his right accrues not first, or Remain after the death of the Tenant for life, because he might have entred before, and therefore is excluded from the benefit of the second saving. Tenant for years by *Statute*, or *Elegit*, is ousted, and a Fine with Proclamations levied, and five years pass now, none may enter, nor he in Reversion, nor particular Tenant, and shall not be aided by the second saving, for both might have entred before the Proclamations pass, because they all are comprised in the first saving; and therefore he in Reversion shall not have years after the Term ended, as he shall have where the particular estate was Free-hold, and a Termor is bound by this *Statute* of 4 H. 7. by the word (*Interest*) in the saving, which word may comprehend Term: First it shall Discend, as by *Dier*; Discontinuance of Tenant in Tail Levy a Fine with Proclamations, and five years pass, Tenant in Tail dies, the issue in Tail shall have five new years; but by him and

Catlins

[illegible], if the Disseisor of Tenant in Tail Levy a Fine, &c. the issue is bound there for ever, because the right was present to the Tenant in Tail when the Fine was Levied, and he, and the heirs in Tail comprised within the first saving, and therefore barred, because they pursued their right within five years according to the first saving, by *Southcot*, *Weston* contrary; and by them every issue in Tail shall have a new five years, but by the said Chief Justice the word (first) added (as it ought to be) to it shall discend, will not admit every discent to have five years, the Remainder or Reversion in Tail upon an estate for life discends to his issue, there the issue shall have five years by the second saving after the death of Tenant for life, by *Weston*, and *Dier*; if the Son purchase, and dies, the Daughter enters and is Disseised, the Disseisor Levies a Fine, five years pass, the Son born after shall have new five years by the second saving, because it is he to whom the right first Discended after the Fine and Proclamations, So if the Feoffee of *Non sane memory* Levies a Fine, and dies, from thence his Heir shall have five years for the reason aforesaid; First shall come, as Tenant in Tail Levy a Fine, five years pass, and then dies without issue; from thence the Donor shall have five years for to bring his formedon in Revertor, because aided by the second saving, because it is him to whom the right first cometh after the Fine, and Proclamations; and in all those cases there is a new right or Title accrued, Discended remains or comes after the Proclamations, which was not in any other before, upon cause made before the fine; And disseisen here is no such cause which shall make *Stowel* to have such right, which was not in any o-

other,

ther, but first in himself, and so it is not here, because the right was first in his grand father, which is saved in him and his heirs by the first saving, and therefore shall not be saved by the second: And ths makers of the Act intended not to aide them by the second saving which were aided by the first, nor on the contrary. But to comprehend by the one saving those which were out of the other saving, and therefore *Stowell* is not saved by the second saving, because he entred not by his own right, nor the right Discended, (Discended in such) nor such matter before the Fine, that the makers of the Act intended, and he shall not be aided by equity, for no equity here, because universality is more regarded then particularity; one hath two defects as to present right, or when future right happeneth, all ought to be removed from him before the five years commence, and if it happeneth within a moneth after in any of the defects again, and so continue all the five years, or to the end of the first moneth of the five years, his heir dying within age before the five years Commence, they do proceed, and the not claim within the five years shall bind the party, and his Heirs as well as if they had been void of all defects during all the five years, if they had no defect when the Fine was Levyed, but had before the last Proclamation, and so continued; when all the Proclamations incurred, he shal not be bound to five years next after the last Proclamation; but shall have new five years after all defects removed; by *Plowden*, Successors shall not be bound, by 4. H. 7. by Fine, or negligence of their predecessor, as *Bendlos* would have it.

Sir

Henry Nevils Case.

THE Arch Bishop of *Canterbury* Grants the Office of the keeping of a Park, with a Rent charge of three pounds *per annum* for the exercising of it to Sir *Edward Nevil*, the Father, and Sir *Henry* the Son; and after Sir *Edward* the Father was attainted of Treason, and the Park, and the Mannor out of which the rent was Granted, come to the King; and Sir *Henry* being Survivor, exhibits his Petition to the Exchequer for the Arrerages of the Rent incurred before, and to be paid the Rent from this time forward, and had Judgement according to his Petition in the Exchequer, without suing to the person of the Queen. 378. P. 12. El. in Exch. upon a Petition.

1. If an Office of skill and confidence, which requires diligence and attendance, be granted to one for life, as the Custodie of a Park, Stewardship, Bailywick, &c. he may not Grant this over, 21. *E.* 4. 20. nor forfeit this to the King for Felony nor Treason; otherwise it is if it be granted to one and his Heirs, in Fee, 1 H. 7. 28. there he may grant this over, because it is so intended by the generalty of the estate; but where it is granted for life onely, there no other is comprehended in the Grant, but the Grantee himself; so that he cannot make a Deputy without words, and therefore much less may he Grant this over; but if

if such Grantee for life be attainted of Felony or Treason, or imprisoned, or go over the Sea, or becomes of *Non compos mentis*, &c. so that the Grantor hath prejudice by his absence or default of attendance, this is a Forfeiture of the Grantor for the not doing or misdoing, notwithstanding that he be pardoned after, or the other defects removed; but if the Grantor hath not the prejudice by his absence, or default of attendance, the Grantee shall have the Office again after his Pardon, &c. but otherwise it is of the King's Grantee in such case; for the Office, Fee, and the person of the Officer, was once discharged by the attainder, and the King may grant the Office to another, and he being the first Grantee, shall not be kept out by his Officer by such Grant, but otherwise it is in the case of a common person, for the Queen shall be unknown of her Officer by such Grant of the Kings, and then the confidence and other causes of the first Grant shall be broken by it, which would be inconvenient.

2. If one Office of skill and confidence be Granted to two for their lives, and the one is attainted of Treason, this is not a Forfeiture of the Office, but that the other shall keep it presently, and the Fee also.

But admitting that the King shall have it during his life, which is Convicted of Treason, yet after his death the Survivor shall have it Adjudged, but
381. if the King Grant such Office to two, and the one commiteth Felony, or Treason, there the King shall have the entire Office by Forfeiture, for that is shall be extinct in him, and goes by way of discharge, and is a thing entire, but in the other case it

but a Transmutation from one to the other the one shall not prejudice the other for his hold.

3. The King shall have an Office of service of estate of inheritance by Forfeiture, for that may Grant this over, although that he himself not use it; but otherwise it is of an estate for life, 7. 28.

The Fee here shall not be Forfeited, for that Office shall not be Forfeit to him, to whom it appropriated; for the Office is appropriate to person, and the Fee to the Office; and so the Office and Fee are Concommitant, as Estovers to burned in such a house, or Common granted such a place to one for his Cattle *levant*, and chant in his farm of D. are made appurtenant; Estovers cannot be severed from the house, H. 7. 7. Nor the Common from the Farm, cept by extinguishment, 26. H. 8 4. Annuity *consilio impendendo*, because it is a thing by rson of the person.

Annuity granted by reason of an Office, is determinable with the Office, and continues the Office as an incident, and inseparable, the estate in the Annuity is one and the other Office, 7. E. 4 22. (before *fol.* 161.)

Annuity *pro consilio*, &c. be Granted, two, and the one of them be attainted, the other shall have the Annuity, because it can not be Forfeited.

Simpsons Case, if the King Grants the Office Sheriff to two, and one of them is Attainted, the entire Office is Forfeited, and the Survivor shall not have any thing, because the *Patent*,

and

and the Office are entire, and may not be severed, and the King shall make it to extinct the Patent, and to make a new Officer, for he cannot be an Officer, adjudged *Brereton's* case.

The Earl of Leicesters Case.

390. Tr. 13. El. in B. R. Tr. against Haydon.

THE Earl of *Leicester* was indicted before eight, upon a Commission awarded to 15. and after a new Commission was awarded to the Major of *London* and others, to send for the indictment taken before the 15. whereas in truth it was taken before 8. of those onely, and thereupon arraign the said Earl; and moreover the second Commission recites, That he was indicted before the said 15. of divers Treasons, and expres's none in certain, and *ex illa causa* and *causis*, to proceed against him according to the Law, whereupon he was arraigned, and condemned thereupon accordingly; and after the said attainder was confirmed by Act of Parliament, which recites the said attainder, and confirms it, and besides ordains, That the said attainted persons, shall be attainted of high Treason, &c. And the attainder upon the indictment, and the confirmation by Parliament, were adjudged void.

1. For

For that the Indictment taken before 15. not an Indictment taken before 8. for the leſſer number will not include the greater, but the contrary; and there may be two Indictments, one taken before 15. and the other before 8. and for that the number is expreſt, there is certaintie what Indictment the Queen intended for miſpriſion of time, place, and number ſhall make the thing void, when they are limited for certainty, and take away incertainty, as of the time of 7. E. 3. 26. one brings a Writ, and Recites that it is contained in the Articles, made in the time of King *Edward* Father of the King *Edward* the Third, that no Sheriffe ſhould put into Inqueſts, &c. and declare void according to the Statute, & the Writ was abated by Award, for that the Articles, that is to ſay, *Articuli ſuper Chartas, cap.* 9. was made in the time of *Edward* the Firſt, and not in the time of King *Edward* the Second, which was Father to King *Edward* the Third. So E. 3. a Statute Merchant was made to pay 16. E. and the party ſues Execution and the Writ ſuppoſed the ſumme to be paid, 14. E. 3. and by the ſuit the Feoffee was ouſted, and ſued his Writ of Errour in the Kings Bench; for the Kings Bench, becauſe it is the higheſt Court, ſhall reverſe Error upon ſuits in the Chancery, according to the order of the Common Law: So a deceaſans which recites a Statute to be made the 10. day of *May*, where it was the firſt, is void, becauſe time certain, and that to which facts are referred is materiall, becauſe there may be two Statutes, the one the firſt, the other the tenth day. Miſpriſion of the place, as 38.

H. 6. 34. one pleads Letters Patents dated at *Westminster*, where it did beare date at another place, Naught; because the place is materiall, and is circumstance and witnesse of verity and certainty. So by Commission to arraign one upon an Indictment at *Dale* in the County of C. where he was Indicted at another place in the same County there, may not be arraigned by this authority, for the reason aforesaid. Misprision of number, as 23. Assises *placit.* 8. Writ of Redisseisen abate, because the Sheriff tooke with him but one Coronor, where *Magna Carta, cap.* 3. appoint two at the least. So in a *Precipe* there ought to be twelve Summoners. So 8. *H.* 7. *pla. ultima*, the number limited by the Act, 3. *H.* 7. *cap.* 1. concerning the Star-Chamber ought to be observed: So an accountant found in arrearages, shall not be commited to Prison, if there be not two Auditors, because *W.* 2. *cap.* 12. saith, *auditorum*. So 2. *E.* 3. 8. A Writ of Attaint supposed that the Verdict passed before 4. Justices, and the Record proves that before 2. there is no Warrant to take this Attaint. But 31. E. in the Booke of Assises, *pla.* 2. a *Procedendo*, supposed that the Assise was arraigned before 2. where it was before 3. good, because no falsity there, because the greater comprehends the lesse, not on the contrary.

2. By *Anderson* which was of Counsell for the Defendant, and which in part confessed that the arraignment was not duly made: yet said, that it was not void, but voidable: See
394 there the Office of Justices for Treason, and their Authority for Judgement given; where the due circumstances of Law are not observed,

ed, is not void, but voidable by Error; as 2. E. 4. 3. 11. H. 7. 4. and 2 *Mar.* 1. Judgement given upon a Plea of Land, 21. H. 6. and 21. E. 4. 4. and 62. where a Fine levied without Originall, is voidable by Error, and by him, and *Lovelace* this Writ of Error is taken away here, becauſe a thing defeaſable confirmed by Parliament, is made indefeaſable.

The counſell of the Earle to the contrary 395
clearly, that the Authority given to the Mayor, and the others by the ſecond Commiſſion, is to proceed upon one Indictment, and he proceeds upon another, and ſo exceeds his Authority, and therefore ſhall be void: Alſo they are no Juſtices of the Treaſon, but of the Indictment and the Treaſon expreſſed in it; and there is not any ſuch Indictment, and no Treaſon in certain is expreſſed in their Commiſſion: But the Relation is generall to treaſons contained in the Indictment, where in truth there is not any ſuch Indictment, and ſo the relation of a thing incertain in it ſelf, to a thing which is not done; the thing referred is void, (otherwiſe it is of a thing certain) as before, *fol.* 169.) A Leaſe of all his Lands in *D.* which he hath by his Mother, where 2. E. 4. 27. before *fol.* 191.) releaſes all his right in them, and hath no Land there by the Mother; but by purchaſe with his Father, this Leaſe and Releaſe are void for the cauſe aforeſaid: But otherwiſe, it is where he leaſes and releaſeth all his right in White acre in 396
Dale, which he hath by his Mother, or hath by his Father; or Purchaſe, becauſe the ſaying there which he hath by his Mother is ſurplu-

ſage, becauſe it was certain enough before; all the parts of the Commiſſion ſhall be conſidered together, and fulfilled as of every other Deede: As for the laſt part of the Letter of Attorney, although as well to deliver ſeiſen, as to take by the words of the firſt part. So here becauſe they have authority to arraigne the Plaintiffe upon the Indictment, onely taken before fifteen, and he was arraigned by Indictment before eight of them, all is void, and *Coram non Judice*, And it is not reſemblable to the Caſes put by *Anderſon, fol.* 349. becauſe there they have authority upon the Cauſe, and the Cauſe was within the Juriſdiction of the Court, and the Order is miſuſed, in which Caſe the Acts ſhall not be void, but voidable: But where one is aſſigned to doe one thing, and he doth another, (as here,) this other is meerly void, and without Authority; as 9. E. 44. by *Choke*, He who Arbitrates another thing then is committed to him, makes ſuch Arbitrement void.

Anderſon and *Lovelace* for the Defendant, the Plaintiffe ſhall be taken by this Statute, to be attainted, or at leaſt concluded to ſay otherwiſe, becauſe the recitall of the Act is an Eſtoppell to all; becauſe every Subject is party, and ptivy to an Act of Parliament, and the Statute ſhall not be void to all intents. And the Expounder ought not to make Expoſition for to confound the Text, by 27. H. 8. c. 10. A woman may refuſe her Joincture, if aſſigned after Marriage, implies that if it were aſſigned before Marriage, that ſhe ſhall not refuſe, 9. H. 6. 9. Recitall of an Indenture

nure of defeasans, concludes the party to deny the Deed.

By the Counsell of the Plaintiffe, the Act of Parliament cannot enure as a Confirmation of an Attainder, and as a new Attainder also, (for then a man shall be twice convict of one Crime which shall be superfluous; yet 11. H. 5. 5. One attainted of Fellony may be arraigned of Treason, because it is a higher offence, and shall forfeit Lands of whomsoever holden, if the Treason is committed before the Fellony; but where offences are equall he shall not be twice attainted, for one Deed shall not be a Confirmation and Grant of one same thing. As the King recites by his Letters Patents that he hath made J. a Denison, or hath manumissed him being his villain, and confirm it: and besides grants that he shall be a Denison or Free, all this is but a confirmation, because the Kings Patents shall not enure to two intents, and therefore cannot plead the second Patent for his Legitimation, or Manumission. But the first Patent so 9. H. 7. 2. before *fol.* 156.) and 7. H. 7. 14. The King grants Land by his Letters Patents, and reciting them, confirmes the Estate of the Patentee by the second Letters Patents, by authority of Parliament; and saith further, that he gives and grants the same Land to the Patentee; he shall plead the second by way of Confirmation, because the Land pass by the first Patent, not by the second, if he doth not shew that the Land came again to the Kings hands after the first Patent: But if the King grants Pasture for two Oxen in his 397

Land, and by the second Patent reciting his first Grant confirmes it; and moreover gives and granteth Pasture for two Oxen to the first Grantee, there it shall enure as a Grant and confirmation also: And the Grantee shall have Pasture for foure Oxen, because they are severall things which are mentioned in the Confirmation, and in the Grant. And in the other Cases before, it is one same thing mentioned in both, and not severall: Also the
398 Statute recites none but persons therere cited to be attainted, but the Plaintiffe was not attainted before, for the reasons aforesaid; therefore he is not attainted by the Statute, as the King recites by name, that such and such were Burgesses of *L.* and grants to the Burgesses before named to be quit of Toll, *&c.* that will take the benefit of it, they ought to averre who is Burgeis of *L.* And if the Plaintiffe be attainted by Act also, and the Defendant will plead this, so then his plea shall be double, because he hath pleaded an attainder by the Common Law, and also by the Statute. But here it is not double, because it is not a new attainder, but a Confirmation: And because he cannot plead the Confirmation without the thing that was Confirmed. Also the Recitall and Confirmation by the Statute is not taken but *pro ut*: And also the recitall being false, shall be intended to be upon Information: And therefore an averment lies against the recitall. So a License to alien Lands holden of the King, *ut dicitur*, there he which hath the Licence is not Estopped, to say that it is holden of another then the King, because the

Tenure

Tenure in *Capite* is not precisely affirmed, but *videtur*, which taketh away all absolute assurance, 29. *Ass.* 38. Also the Statute refers to an Attainder had before: And so to a thing which is not *in rei veritate*, for the cause aforesaid; and therefore shall be void; but if the thing was before, and wanteth force and effect, then this shall be made good by the Statute, and there the Act is good, and hath power as to the thing, 29. E. 3. 24. *Grants*, 100. The King reciting an Attainder in Parliament of one *Mattravers*, by his Charter of Pardon reverseth the same, and restores him, and after this, all is recited in another Parliament, and Confirmed by the same Parliament, and good for the Cause aforesaid; So 399
18. H. 6. 33. Parliament confirmes the first Letters Patents this enures; according to the Effect and Purport of the first grant, and shall not take away the Condition, if any such be; the King gives Land to *J. S.* the Parliament Confirmes, its a good grant: And so when the Parliament Confirmes a thing which is defective, it shall give power to it, if it be Confirmed. (as here the Act shall be void to all purposes, as 5. E. 4. 40. and 41.) If one Village hath Customes which is against the Law, and Reason, and no others, and the Parliament Confirmes their Customes, it is void, because they had not Customes; for things used meerly against the Law and Reason are not Customes, notwithstanding such usage. And if the branch of one Act recites another Act, be it in the Commencement, or Continuance, it is void, as 1. E. 6. c. 12 repeales all offences

offences made Fellony after the Commencement of the reigne of H. 8. and by one branch in it; this Statute excepts imbeſſelling of goods by ſervants, made Fellony in the ſeven and
400 twentieth yeare of H. 8. commencing the 4. of *February*, and continuing untill the 14. of *Aprill*, whereas it finiſhed the fourteenth of *Aprill*, and ſo Statutes which miſrecite things, and are referred to them, ſhould be void and conclude no man. And ſo here the Statute which recites that the Plaintiffe was attainted, and confirmes it, whereas indeed he was not attainted, ſhall be void.

Coles *Case*.

13. *Eli.*
401 IF one gives to another a mortall wound, whereof he languiſh, the 12. of *February*, and the Queen by a generall Pardon by Parliament, Pardon all miſdemeanors, *&c*; the 20. day of *February*, and after the party dies. Now this murther is Pardoned; Adjudged for that the wound was a Miſdemeanor, and the cauſe of death, and then by conſequence all that which enſueth the Cauſe is alſo pardoned.

The end of the firſt Book.

Newis *and his Wife, againſt* Larke *and others.*

A Man deviſe his Lands to his eldeſt Son in tayle, Remainder to his youngeſt Son in tayle, the Remainder to the heires of his body, the Remainder over in Fee, and moreover his Will was, that if any of his entraylees, do wrong, vex, or moleſt any other of them, for the ſayd Lands; or ſhould Mortgage, bargaine, and ſell, *&c.* the ſayd Lands, or otherwiſe incumber it, other then to Leaſe it to them, that from thenceforth every ſuch perſon and his heires that ſhal ſo doe, ſhall be excluded and diſmiſſed, touching the ſaid intaile; and that the conveyance of the intaile of the ſaid Lands, againſt him or them, ſhall be of no force: But that it ſhall deſcend and come to the party next in tayl to him, as if ſuch diſorderous perſon had never bin mentioned in the ſayd Teſtament. And after the eldeſt Son levies a Fine, and after he and the youngeſt Brother ſuffer a common Recovery, and their Sifter enter; and by the Court her entry is lawfull: But the Writ was abated for that it was *Coram Juſticiariis predictis*, whereas there were no Juſtices named before. *M.* 13. & 14. *El. in the Common Pleas.*

1. That the Fine and Recovery are ſuch acts, bargaines, and incumbrances which make a forfeiture.

2. The penaltie here inflicted for the forfeiture

feiture is a limitation which determines the eſtate, *Ipſo facto*, without making any diſcond tinuance thereof by the Alienation, and is not a condition by the intent of the Teſtator; and hereby the determination of the eſtate the Fee and Frank-tenement is caſt upon him in the next remainder (that ſhall not alien) without Entrie, as upon an Eſchear, or dying without iſſue, and hath the intent as if it were deviſed, untill he ſhall alien.

The entry of *Scholaſtica* the wife of *Newis* (becauſ *I.* and *F.C.* her brothers, levied a Fine & ſuffered a common Recovery) by the Court is lawfull: (But the Writ was abated, for that it was *coram Juſtic' predict.* where no Juſtices were named before,) becauſe the Fine and Recovery are ſuch Acts, Bargains, and Incumbrances, which make a forfeiture; for that they give title and occaſion to defeat the eſtates taile limitted, to *I.* and *F.C.* For by the Fine with Proclamations, the eſtate of *I.* is barrable, and by the Recovery, the Taile of him and *F.* is defeated, and ſo within the words, and the intent of the penaltie of the laſt Will of their Father *H.C.* Alſo the penaltie here inflicted for the forfeiture, is not a condition by the intent of the Teſtator, which will not that all the eſtates Tailes ſhall be defeated for entry for the condition broken by him in poſſeſſion, or any in remainder ſhall defeat all eſtates, and put him which enters in of ſuch an eſtate as he had before the condition made, as 29. *Aſſ. pl.* 7. *Brooke* Conditions inwords in a Will, lik unto a condition, ſhal not make a Condition, becauſe the intent of the party appears not to be to defeat all

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the ſtate (*ſcilicet*) of him in remainder there, alſo it is not a condition here, becauſe then he breaks it which enters for the condition; But this is a limitation which determines the eſtate, *Ipſo facto*, without making any diſcontinuance of it by the alienation, and hereby the determination of the eſtate the Fee and Franck Tenement is caſt upon him in the next remainder (which aliened not) without entry, as upon an Eſcheator dying without iſſue, and hath the intent as was deviſed *quousq*, he ſhall alien or incumber. So land given to *I.* in tail, ſo long as *I.S.* hath iſſue of his body, which dieth without iſſue, there it ſhall reveſt preſently without entrie for words named in a Will, if they are not apt ſhall be drawn to the intent, and the Law ſubmits it ſelf to the Will, as to the Parliament, as *Dyer* termed it in matter, order, and form: So a gift of Land ſo long as ſuch a one is Abbot, or during coverture, is a limitation: So *Matrimonii prolocuti*, there the eſtate ſhall be defeated by the intent without expreſſe Condition in Deed, *Fitzh. nra. br'.* 201. *E.* A man deviſes to a woman in *London*, upon condition that if ſhe matrie, the land ſhall remain to his ſonne in taile, with remainder, over the woman marries, the ſonne ſhall have *ex gravi querela*, by *Fitzh.* by *Dier* he may enter: So it ſhall be taken as a limitation, yet it ſounds as a Condition. And by *Dier* a condition in deed, in a conveyance made. By *Fitz-James* 28. *H.* 8. was taken by limitation *a fortiori*, where it is by laſt Will, where the intent ſhall rule the words, and the words not the intent, and the intent ſhall be obſerved in the expoſition of

Wills, and of the Teſtator in making of his Will, hath a Power like to an Act of Parliament, by *Dier*, and the intent in a deviſe ſhall make Eſtates paſſe contrary to the Rules of the common Law in Deeds or other gifts, as a Remainder is good without an Eſtate precedent. So where the particular Tenant entailed diſagrees, ſee 34. *E.* 3. where it depends upon condition, ſo upon a deviſe to the ſonne, after the death of his wife, there ſhe takes an eſtate for life, although it be not given to her; ſo 10. *H.* 7. 20. *Ceſtuy q; vſe*, deviſes that a woman his Executrix ſhall ſell the land, ſhe ſells it to her ſecond husband, good. So a deviſe to a man and his heires males which hath iſſue a daughter, who hath iſſue a ſonne, he ſhall inherit, 28. *H.* 8. by *Dier* otherwiſe.

Bracebridge *againſt* Cooke.

Tr. 14. *El. in the Kings Bench in E: Firme.*

LEſſee for yeares grant his terme to the wife of the Leſſor, and a ſtranger; the wife dies, the ſtranger ſhall have the whol terme and land by *ſurvivor*. 418

Adjudged.

1. For that the intereſt of the husband by reaſon of the coverture ſevers not the Joincture, nor alters the poſſeſſion of the terme or other chattells, realls of the wife, but is poſſeſſed of them in the right of his wife; ſo that if a ſtranger outs them, the wife ought to joyn with the husband in *Ei. firme*, and ſhe ſhall have judgement as well as the husband; and therefore if

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the husband charges it, or if he deviſe the terme and dies, the deviſe is void, becauſe he had the Eſtate in him at the time, and before the time of his death : But the property of Chattells perſonalls is deveſted out of the wife and veſts in the husband, becauſe of the coverture ; and therefore if one gives goods to a Fem covert and a ſtranger, the joyncture is preſently ſevered by the Law, and ſhe and the ſtranger ſhall be Tenants in common.

2. The immediate Fee and frank Tenement that the husband hath in his owne right, ſhall not drown the terme which he hath in the right of his wife where ſhe is ſole Leſſee, nor the moitie of the terme where ſhe is joint Leſſee, as here, and the operation of the Law ſhall not do a thing contrary to equity and reaſon to the prejudice of another ; namely, in
419 Chattells Realls, which are things of continu-
ance, becauſe the husband by expreſſe act, hath not given nor altered it as he may by making of a Feoffment of the land, or new Leaſ, &c. But hath left it to the judgement of the Law. The Law preſerves the eſtate of the wife, which eſtate as to the wife is disjoint from the Freehold and Fee-ſimple, but a rent granted to the tertenant and a ſtranger ; the Tenant dies, the other ſhall not haye all, becauſe the Moity drownes in the land, and therefore that was not in joyncture at the time of the death of him which firſt died; and the other ſhall not have all as ſurvivor : But the rent here ſhall be apportioned ; becauſe of the occupation that every one hath *per my et tout* of the profits. But husband and wife here cannot joyn in *E: firme*

with the ſtranger: But the Husband ſhall uſe his reall action upon an Ouſter during the coverture, becauſe by this he continues all his eſtate, but that part of the State taken from him by the diſſeiſin by the *Eiectione Firme*: And the ſtranger may have *Eiectione Firme* for his Moity (as two Joyntenants for life, and to the heires of one of them looſes by default, the one ſhall have right, and the other a *Quod ei deforceat*) and the Moity of the terme is not ſuſpended, for then it ſhall not ſurvive. Parſon, Patron, and Ordinary, make a Leaſe for yeares of Gleeb-land, the Parſon dyes, the Leſſee is made Parſon and dyes, his Executors ſhall not have the reſidue of the terme, becauſe the terme was extinct by the freehold of the Land, which the Parſon had in him, becauſe both in his owne right, and to his owne uſe; yet in ſeverall capacities: But by *Dier* it ſhall not be extinct, becauſe he hath the terme in his owne right, and in Capacity of his naturall body, and the Inheritance as Parſon, which is another Capacity: But where the Leſſor hath the terme of yeares, as Executor to the Leſſee, it is not extinct; but the terme when the Leſſor dyes ſhall be revived.

Bracebridge *againſt* Clouſe.

A Man ſeized in Fee of a Mannor, maketh a Leaſe of forty Acres, parcell of the Mannor for forty yeares, if the Leſſee ſhall live ſo long, and after by Poll makes a Leaſe of the ſayd forty Acres to *J. S.* for ſeventy yeares:

yeares: J. S. grants his terme to the Wife of the Leſſor, and a ſtranger; the Husband makes a Feoffment in fee by Indenture of the Manor; and moreover grants by it, all his other Lands and Tenements in the ſame Village to the Feoffee and his heires, and this Feoffment was to the uſe of the Feoffor and his heires, and dyed, his Wife dies the firſt Leſſee for yeares dyed within the forty yeares; the ſtranger entred into the whole forty Acres, and upon an Ouſter by the heire of the Leſſor brought *Ej. Firme*: And adjudged that he ſhall recover for his owne moity, and ſhall be barred for the moity of the Wife.

1. That the Leaſe for ſeventy yeares is good for ſo many years which are to come of it after the death of the firſt Leſſee, yet is without Deed (for that the Leſſor in reſpect of his Reverſion in fee, may contract with another for any eſtate to be derived out of the Reverſion) and ſhall take effect then, and not ſtay untill the forty yeares are extinct be effluction of time; for the Condition, if he ſhall live ſo long, is a limitation which determines the eſtate, otherwiſe it is of a Collaterall Condition, for although that the terme be finiſhed by it, or by ſurrender or forfeiture; the ſecond terme ſhall not commence untill the terme be incurred, for that hee had not power to contract for the poſſeſſion during the firſt terme, in reſpect of any ſuch poſſibility of the breach of Condition, ſurrender, forfeiture, &c. As upon a Leaſe for life, for the incertainty of the determination of the eſtate by his death, and for the poſſibility

which was at the time of the Contract, that the Leaſe ſhall be executed before the death of Tenant for life by his ſurrender, forfeiture, *&c.* As the Leſſor maketh a Leaſe for life, and after maketh a Leaſe to another for one and twenty yeares to commence preſently; Tenant for life dyes, or ſurrenders, the ſecond Leaſe ſhall commence preſently: But if one make a Leaſe for forty yeares by word defeaſible, upon Condition to be performed by the Leſſor, and incontinently makes a new Leaſe for forty yeares by word, this is void; yet the firſt Leaſe is avoided by performance of the Condition, or is ſurrendered becauſe there is no poſſibility that it will be executed, in reſpect of the Collaterall Condition: But if the ſecond Leaſe be by Indenture it is good by Eſtoppell: And if it be by Deed Poll with Attornement, the Reverſion will paſſe.

2. By the firſt Leaſe of forty yeares, the forty Acres were ſevered from the Mannor for a time, for that the Leaſe was executed by entry, but the Reverſion and Franktenement is parcell of the Mannor; but the Leaſe for ſeventy yeares not, nor may be executed by entry during the firſt Leaſe, but is executory after this determined, then of this Leaſe for ſeventy yeares the Leſſor hath not any Reverſion; then this is not ſevered from the Mannor, but continues parcell of it, becauſe it is executory, and not executed by entry, and then when the Leſſor maketh a Feoffment of the Mannor, the Reverſion which depends upon the Leaſe for forty yeares, paſſe as parcell of the Mannor, which Reverſion may

be

be parcell of a thing in poſſeſſion (But not contrary) diſcharge the moity of the terme for ſeventy yeares, which is extinct by the Livery that gave the poſſeſſion; otherwiſe it were, if the terme had beene executed at the time of the Livery, except the Husband made Livery in this Land leaſed, for the Land is ſevered by the Leaſe, and here the execution of the poſſeſſion to the uſe in an inſtant ſhall not revive the terme, which was extinct before by the Livery: Leſſee for yeares before entry hath not poſſeſſion, ſo that a Releaſe to him before entry is not good, but he hath onely an Intereſt and right, which is grantable or forfeitable before entry, the Leſſor ſhall not have Rent untill he hath waved the poſſeſſion, or the Leſſee enters, becauſe preſently the Leſſor is ad judged occupier, 28. *H.* 8. 14.

3. The grant of all his Lands and Tenements ſhall paſſe the terme, becauſe it is his
424 Land for the time, and for that hee had not any other Land there, or otherwiſe the words would be void; and therefore the opinion of *Brook* was denyed to be Law. 7. *E.* 6. which is contrary: but if he had other Lands there, then it may be that the terme will not paſſe.

4. He had Judgement for one Moity, and was barred for the other, where he demanded the whole, which is not good by *Plowden*, but ſhould have been barred for all (if exception had been taken to it) for that he might have had a better Writ for the Moity.

Vernon

Vernon *against* Manners.

M. 14. & 15. *El. in the Kings Bench.*

CHallenge of the Array, because the Sheriffe which made it is Cosen to the Tenant in the ninth degree. Adjudged good he can shew how he is Cosen, 21. *E.* 4. 75. And notwithstanding the Tenant be seized in right of his Wife, to whom the Sheriffe is not inheritable, for by reason of Cosenage, it shall be intended favourable, and although that he cannot inherite the Land demanded, yet he may inherite other Land, as heire to the Tenant. 416

Smith *against* Stapleton.

P. 15. *El. in the Kings Bench. Replevin.*

LEase for life to Husband and Wife, Remainder in tayle to N.T. their Son, a stranger levies a Fine, *Sur Conusans de droit come ceo que il ad de son done al.* N.T. the Son, which grants and renders the Land to him for fifty foure yeares, rendring Rent, hath issue and dyes before any Proclamations made, and after the Proclamations passe, and after the Husband and Wife dyes; Adjudged that the Lease is good against the issue of N. in tayle, by reason of the Rent, otherwise it were, if the Rent had not been reserved. 141

First, The Lease had not been voyd against N.T.

N. T. the Father himſelfe if he had ſurvived the Husband and Wife, if it were by words, notwithſtanding it be a preſent contract, becauſe it depends upon an eſtate for life, which is uncertaine when it ſhall determine; otherwiſe it is, if the firſt had been a Leaſe for yeares, which containe certainty, there the ſecond Leaſe ſhall be voyd for the firſt terme except that it be by Deed poll (with Attournment) in which caſe it ſhall enure by way of a grant of the Reverſion, if the party will uſe it ſo, or by Indenture or Fine, which are matters of Eſtoppell.

Secondly, The Leaſe is but voidable againſt the iſſue, becauſe of the Rent which is a recompence; otherwiſe it is of a charge, for it ſhall be voyd by the Remitter: and inaſmuch as this contingent Leaſe is not avoided, but continues during the Proclamations, the Statute of 32. *H.* 8. maketh this a barr againſt the iſſue during the terme.

Thirdly, A Leaſe by word made by the 141 Husband and Wife, is the Leaſe of the Husband onely, and not of the Wife; poſſeſſion without title is ſufficient to make an Advowry for dammage feaſant, protection pleaded for part, and *Inter alia*, good by the Rule of the Court. A Fine pleaded by way, *De finalis Concordia facta fuit*, and not that he levied a Fine, and alſo pleaded that it was acknowledged in the Kings Court, without ſaying in the Common pleas, is good: and 22. *H.* 6. 13. A Fine is a Record, although it be not ingroſſed, and ſhall be executed.

Fourthly,

Fourthly, How, and in what degree this Leaſe paſſe at the beginning by the Fine.

The eſtate of N. not altered by the Fine of a ſtranger which had not any right or Eſtate in the Land; but is Eſtopped for his life to ſay otherwiſe, but that he receives fee ſimple by the Fine. 431

Leaſes by word, by Deed Poll, by Indenture, are to be conſidered how they ſhall enure: As if a Leaſe be made by words, without Deed of Lands by one that hath fee ſimple for one and twenty years to commence preſently, rendring a rent, and after the ſame day maketh a new Leaſe by Paroll to another for the ſame terme, or for a leſſor terme, the ſecond Leaſe is void, although that the firſt Leſſee ſurrenders or forfeits; becauſe at the time of the firſt Leaſe he hath not but a Reverſion and no intereſt in him to contract for the poſſeſſion: And he that will by contract make another poſſeſſor of the thing, ought to be proprietor of the ſame himſelf: As if one ſells a Horſe upon condition that the Vendee ſhall pay him forty ſhillings at Eaſter, and after he ſells the Horſe to a ſtranger, and after the firſt Vendee payes not the forty ſhillings at Eaſter, and the Vendor reſeiſeth the Horſe, the ſecond Vendee ſhall not have the Horſe, becauſe the Vendor had him not at the time of the ſale; the Condition only inables him not to contract for the property and poſſeſſion, which he then had not; but if the Leſſee for one and twenty years be, and the Leſſor the ſame day grant the Reverſion by Deed for twenty one years to commence

mence preſently, it is good with Attournment and he ſhall have the Reverſion during the firſt Leaſe, and the Rent as incident thereunto, becauſe it is another thing then the poſſeſſion; So a Leaſe by word for years to commence after the firſt year, is good, becauſe it is of another thing then the firſt Leſſee had, becauſe the ſecond Leſſee is to have the poſſeſſion after the firſt poſſeſſion and intereſt expired. A man leaſes for one and twenty years in poſſeſſion, and preſently maks a Leaſe of it for one and thirty years by word, this is good for the laſt ten years, and Executory for it, for a Leaſe for years is Executory, and ſeverall for every yeare and day, and is as to execution as ſeverall contracts: And therefore ſuch contract may be good in part, and void in part. So if he Leaſes for 21. years, to commence 10. years after, and he maketh a Leaſe for 31. years to commence preſently, it is good for the firſt 10. years, and void for the laſt 21. years, for that he had contracted before and was certain although that the firſt Leaſe were forfeited or ſurrendred: otherwiſe it is if the firſt Leaſe had bin incertain, as a Leaſe for life; there the ſecond Leaſe had bin good after the Tenants life, not during his life although he ſurrendred or forfeited, unleſſe it had bin by Fine or Indenture; becauſe Eſtoppels, if the ſecond Leaſe for the ſame years be by Deed Poll, there the reverſion with the rent paſs by Attornment by the demiſe of the land, by the name of Land; if the poſſeſſion cannot (as a Reverſion upon an Eſtate for life, paſſeth by bargaine and ſale of the land by Deed inrolled) and the Grantee

may

may uſe his Deed as he pleaſeth; and therefore may uſe it as a Grant of a Reverſion with attornment, otherwiſe it is, if it be by word, becauſe the Reverſion for years cannot be granted by word. But if Leſſee for years will uſe a Leaſ Poll as a preſent Leaſ where he hath not attornment the Leaſ is void, although the firſt ſurrendred or forfeited as it is if it were by word, becauſe a contract by Deed Poll paſſeth not that which another then injoyes.

But if the ſecond Leaſe were by Fine or Indenture, and the firſt ſurrendred or forfeited it is good; for if one leaſes land to me which he hath not at the time by Fine or Indenture, and after purchaſe it, or it deſends to him, I may enter and occupy by Eſtoppell, and I ſhall be compelled by Eſtoppell to pay the Rent, becauſe every one is concluded to ſay, but that the land paſſeth in poſſeſſion for fourty five yeares by Eſtoppell, and ſhall be good in eſtate to have the other yeares, becauſe they are not incurred in the life time of the Tenants for life: for if the Leaſe for fourtie, five yeares had been by word, and the particular Tenant for life had died, the Leſſee ſhould have it againſt the Leſſor. 434

If the eſtate given by the Fine is defeated, the Fine ſhall be void, although the Proclamations paſſe after: for the Fine is the Principall, and the Proclamations but acceſſary to the Fine, as Tenants in taile diſſeiſed, levies a Fine to the diſſeiſor: *Sur conuſans de droit*, or *ſur releaſe* and dies, there the iſſue if he enters before, all the Proclamations are paſſed is remitted and is not barred, for that 32. *H.* 8. which ſaith that Fines after Proclamations bars tayle, intends of Fines remain

remaining in force until after the Proclamations, that then it ſhall barr tayl, becauſe otherwiſe the Proclamations are in vain for to give notice of the Fine, if the party cannot defeat the Fine before all the Proclamations ended, by Entrie, Claim, or Action. Tenant in tayle of land grants a Rent, by the render of a Fine, or grant the nomination of an Advowſon by the Rendor or Tenant in tayle of a Rent diſſeiſes the Tenant of the land, and levies a Fine of the land, and Proclamations paſſe; this is no barr to the iſſue, becauſe the Fine was not levied of the thing intayled by *Thometon*: but if Tenant in tayl of a Rent, Advowſon, Tithes, Common, &c. levies a Fine and dies, and after the Proclamations paſſe, the iſſue is barred by the Statute, yet the Fine was not a diſcontinuance, becauſe things which lie in grant, but there he may claim (where entrie lieth not,) and good for to defeat the Fine and Proclamations, and to ſave the tayle: But if Proclamations paſſe, a *Formedon*, depending, the iſſue is barred by this Statute of 32. *H.* 8. otherwiſe it is if one if one brings an Action within five yeares upon the Statute of 4. *H.* 7. and the five yeares incurs hanging the Action, becauſe 32. *H.* 8. favours not eſtates tayle, and is ſtricter againſt them, then 4. *H.* 7. againſt a ſtranger, becauſe 4. *H* 7. allowes benefit to a ſtranger to purſue his Action within five yeares, 32. *H* 8. before the Proclamations incurred, not without recovery alſo. Leaſe executory grante by the render of a Fine by tenant in tayle, ſhall be good againſt his iſſue after Proclamations incurred after the death of the father. If a man makes a Leaſe for

26.

21 yeares or for life to one, and presently maketh a Lease for one and twenty yeares of this to another by Indenture or by Fine, rendring Rent, the Lessor shall have an Action of debt for the Rent, by reason of the Estoppell for every one is Estopped against the other, to say that the possession passeth not; but if the second Lessee enters and be expulsed by the first Lessee 436
he may well plead this matter in Bar, against the Lessor in an Action of debt. And so rent by Estoppell avoyded by entry and expulsion. Tenant in tayl maketh a Lease for fourty years to commence ten yeares after rendring Rent, and the next day dies, the issue enters, and infeoffs *I.S.* within the ten years, and after the ten years the Feoffee waves the possession, and Lessee enters, and payes the rent to the Feoffee, which accepts it: Now he hath made the Lease good, for by the Feoffment the Lease was not avoided; because it was an Act indifferent and Eligible, and he could not make his Election before his time, and then this Election affirms or disaffirms a voidable Lease; And if one entry of the issue avoids not a Lease executory, *A fortiori*, a descent of the Remainder where entry fails, shall not avoid it; but a rent charge he shall, because there the issue hath not *Quid pro quo*, and to his disadvantage, the entry of the issue and Feoffment, over dischargeth the Rent charge granted by his Father, 14. *Ass. pl.* 4. So one Statute, 9. *E.* 3. contrary, but no Law by *Plowden* and *Bromley*; for that the Remitter dischargeth the Execution as well as the Rent charge. Trees sold by Tenant in tayl, and not severed in his life; the bargainee shall

not

not have them 18. *E.* 4. 6. If the Plaintiffe prayes not the Prothenotary to enter his judgement nor pay for it, the judgement ſhall not be entered without the order of Court.

Davies *againſt* Pepys.

THe obligee may charge the Heire or Executor at his Election where they both have aſſets, but not doubly; for if he be ſatisfied by the one, the other ſhall be diſcharged by *Audita querela*. *P. 15 El. in the common Pleas. Debt.*

The King untill 33. *H.* 8. could not touch the Land or Heire of his debtor, if he had goods ſufficient by *Magna Charta, cap.* 8. but other perſons were left at large, Advowſon and other Lands were extended for this debt: Debt upon an Obligation againſt one as Heire in the *debet & detinet*; adjudged good, otherwiſe it is againſt Executors, for Executors are debtors, and have their aſſets in one anothers right, (*ſcilicet*) in the right of the ſaid Teſtator, but the Heire hath the Land to him diſcended in his own right, and ſo the property which he hath in the aſſets maketh the debt his proper debt. And therefore if he dies, his Executors ſhall be charged with the debt of his Father, and not his Heire, notwithſtanding he hath the Land by diſcent for that he claimes it from his Father, and not from his Grandfather which was debtor, as it ſeemeth by the Booke of Entries, *fol.* 171. title Debt. Yet inquire by *Plowden*: And if the Heire cometh not in and con-

 feſſe

feſſe the action and the truth of the Aſſetts diſcended, then he ſhall be charged as for his own debt, by *Capias ad ſatisfaciendum*, *fieri facias*, or *elegit*: So if he be condemned upon default, *nihil dicit*, falſe plea, or demurrer, as *Greenſmiths* Caſe is 15 *El.* or upon *nihil dicit*, as *Killegrewes* Caſe is, 3. *Eliz.* or upon any other Plea, or not pleading, &c. otherwiſe of Executors which are debtors: but in anothers right, there Execution ſhall be of the goods of the deceaſed onely, and not of their proper goods, and in debt againſt the Heire all the Land which he hath by diſcent ſhall be put in execution by the Common Law, and in no other Caſe.

Waſt *by cleer Haddon againſt* Brook.

P. 15. El. in the Common Pleas.

IF a man purchaſe Lands, and die without Iſſue and without Heire on the patt of his Father, the Heire of the the Mother of his Father ſhall inherit him, and not the Heire on the part of his own Father. Adjudged. For the Heire on the part of the Grandmother on the part of his father (which conveys by the Father which is a Male) is more worthy of bloud then the Heire on the part of the mother of the Purchaſor which conveyes immediately by a Female, and not by a Male; But if both agree in equall dignity of blood, there the neereſt Heire ſhall be preferred, as the brother of the Grandmother of the part of the Mother of the Purchaſor ſhall be preferred before the brother

brother of the great Grandmother of the part of the Father; for he is neareſt, and the dignitie of their blood as to the Purchaſor is equall for Proximitie keepeth place on the part of the Females conjoyned by marriage to the Males, from whence ſuch blood is once derived by a Male to the Purchaſor by the whole Court: land purchaſed by the Father diſcends, never reſorting to the blood of the Mother of his Sonne, becauſe ſtrangers to the blood of the Father, 39.*E.* 3.29. No woman after the Wife of the Father purchaſor, ſhall have the Land when once diſcended, becauſe it ought to touch this blood alwayes. But then Heires of the Wife of the Father purchaſor ſhall have it, if others fail, becauſe Wives by the marriage after the purchaſe are of Aliance to the blood, and not of the blood of the Purchaſor, otherwiſe it is of marriage which precedes the Purchaſe. And ſo no marriage is to be regarded, but that of the Father and Mother of the Purchaſor, and no marriage after ſhall make a man inheritable to this Land: By the Court *Waſt* aſſigned in digging of Gravell, ſuffering Houſes to bee uncovered, whereby the Timber rotted, and permitting a wall of ſtone to fall to ruine, and a Meadow to lie continually overflowne, and covered with water.

Sir Thomas Wrothes *Case.*

Tr. 15. El. in the Exchеq. Petition.

KIng *Henry* the eight, granted an Annuitie of 20l. to Sir *Thomas Wroth* for his life, to be Usher of the Privy Chamber to the Prince *Edward* his Sonne, without the words, *Pro nobis heredibus & successoribus nostris*; And dies, and after E. 6. dies. The question was, if the Annuity should be determined by it, or if notwithstanding it, the Annuity shall have his continuance. And it was adjudged that the Annuity continues during his owne life, and he shall have the arrerages.

1. If the King reciting a thing executed, which is not materiall, as for the good service which he hath done, grants an Annuity, &c. there the party in pleading shall not take averment of it by 21. E. 4. 48. and 26. *H.* 8. 1. But otherwise it is if the thing be materiall and executory as that he hath released, there he ought to averre that he hath released it, which is in benefit of the King.

2. The not doing of the service here to the Prince, shall cesse the Annuity as well as if the service had bin appointed to the grantor himself, as an Annuity granted by the King, to a Physician, or Schoolmaster, for to give Physick or teach a Stranger, shall determine by not doing of it which is the cause of the grant and executory as the Annuitie it self is.

3. The discent of the Crowne and State Royall

Royall to the Prince, makes him King, and alters the degree of his Perſon, becauſe another Majeſtie there, and requires Officers of greater Honour to doe ſervice to his politicke body: And therefore by this Act of God, the Law diſcharges Sir *Thomas Wroth* from his ſervice, and therefore without averment, that he had ſerved King Edward all his life time, is not to purpoſe, otherwiſe if the ſervice be feaſeable to his naturall body onely, as Phyſick, Surgery, Muſick, Grammer, &c. for the naturall body alters not by aſſumption of the Royall eſtate from its infirmities.

4. That the death of the King E. the 6. hath not determined the Annuity, although that the ſervice be diſcharged by the death of the Perſon to whom it is to be done. For this diſcharge cometh by the Act of God, otherwiſe it were if by the Act of the Party, as if he had withdrawn himſelf from the Princes ſervice, when he was Prince. So of an Annuity granted for life, *pro conſilio impendendo*, to the Grantee which dyeth; yet the Annuity remains; but ſhall ceſſe by refuſall of the Grantee for to give when he is required, becauſe his default, and the Grantor hath not means by Law to compell him to give counſell.

5. The Grantee of the Annuity is good, although that it wanteth theſe words (his Heirs and Succeſſours) for that it is granted in the body Politick, and charges this body which never dies, but alwayes hath continuance as a Grant of an Annuitie or Obligation made by the Abbot and Covent, is good without ſucceſſor, becauſe the Corporation charged

which alwayes continues, otherwise it is of a naturall body, for there the Heire shall not be charged (if he is not named and hath assetts) as by Obligatton of his Father, grant of Annuity or warranty, because as the body naturall which grants is taken away by death; so shall his charge be; if the King without words, heires and successors, grant to one licence to Alien, and die, the Grantee cannot Alien in the time of another King, 2. E. 3. and 3. E. 3. 29. For that it is a licence onely; otherwise of a licence which implies an interest as to an Abbot of a Purchasor in *Mortmaine*, for there the King gives his Signiory upon the matter as it seemeth 2. *H.* 7. 6. Inheritance of the King, or a thing in which he is intituled of Common right, as Lands, Conusans of Pleas out of the Kings Courts, or account by a Sheriffe, shall not passe against the Heires and Successors of the King without speciall words, Heires and Successors; as the grant of a County, *Absque compoto nobis reddendo*; yet he shall account to the Successor, because it is Executory, of Common right to the Crowne, otherwise of a thing newly created, or a grant which is executed presently in the party; yet the perception is Executory, as a grant of a Faire, Market, Warren, &c. without words, Heires and successors, good. Pension or Annuity granted by the King untill he be promoted by us are spoken in the politick body, by which the Heire may promote, and then the Pension is extinct by *Sanders*, cheif Baron, who said as *Plowden* reported, was resolved by the Sages of the Law, 1. *Mar.* that Patents without words; *pro nobis hered. & successoribus nostris*, granted

granted for the corporall exerciſe of an Office or ſervice, are ordered to be good.

Eiſton *againſt* Studd.

A Woman Tenant in fee, taketh Husband, and the Husband and Wife levies a Fine *Sur Conuſans de droit come ceo,* the Conuſee grants and renders the Land to the Husband and Wife, and the heires of their bodies, the remainder in fee to the right heires of the Wife, the Husband hath iſſue by the Wife and dyes, the Wife taketh a ſecond Husband, and they leavy a Fine to their owne uſes, for the terme of their lives without impeachment of waſt, the remainder to the Husband and his heires for ſixty yeares, Remainder in tayle to their iſſue, the remainder in fee to the right heires of the Wife, and the iſſue of the firſt Husband enters for the forfeiture made by this ſecond Fine, by the Statute of 11. *H.* 7. *Cap.* 20. And adjudged no forfeiture; and yet is directly within the words but not within the intent, for that the Joincture and advancement came not originally from the Husband, or any of his Anceſtors, to the Wife, but on the contrary from the Wife to the Husband; yet the Land ſhall be chargable to Statutes and Recogniſances which the Conuſee had acknowledged before, and to the dower of the Wife of the Conuſee which grants and renders it: But yet is not within the intent of the Statute, becauſe the advancement com- *P. 16. El. in the Common Pleas, Electt. firme.*

eth not from the Husband nor his Anceſtors, and therefore to reſtraine Women to diſpoſe of their inheritance after the death of their Husbands, is contrary to the intent of the Statute, and the intent ought to be thought on (becauſe the *Purviewe*, extends not further then the intent of the makers of the Statute) as the Wife infeoffs the Father of him with whom ſhe intends to marry for to regive the Land to them after their intermarriage for lives, or remainder in tayle to the Wife, the Father doth ſo, they have iſſue, the Wife after the death of the Husband levies a Fine to other uſes, their iſſue may not enter; yet it is within the words of the Act of 11. *H.* 7. becauſe the Father gave it to them. But this cometh from the Wife her ſelfe by circumſtance: And the Father was but as an Inſtrument of it, and therefore out of the intent of 11. *H.* 7. which reſtraineth the generalty of the letter of the Statute, and maketh the Caſes within the 465
words out of the penalty of the Statute, by the intent of the Makers: As Infants and mad Men are excepted out of the Caſes of Fellonies made by any Statute; ſo neither thoſe nor a Feme covert ſhall be concluded in the intent of the Statute, which maketh them acceſſary, which ſhall give them Meat, Drink, or other ayde to them which ſhall commit ſuch an Act. So if a bargaine for Land be made, before a Writ brought againſt him and the ſuite depending, Livery and Seiſen is made: It is not *Champarty*, 19. *R.* 2. becauſe he ought to performe the bargaine made upon juſt conſideration, notwithſtanding, *W.* 2. *Cap.* 49. and *Articul.*

cul. ſuper Chart. Cap. 11. So a barr ſee is within the letter, but not the intent of the Statute of 32. *H.* 6. *cap.* 10. becauſe appointed to the Sheriffe in the beginning by the order and diſcretion of the Court for his labour and attendance, when the Priſoners are brought to their delivery, 21. *H.* 7. 16. So *Wreck* if a Man, Dog, or Car, eſcapes alive, ſhall be kept, that the party may have his goods if he claimes within the yeare, by *W.* 1. *cap.* 4. is intended of ſuch things which will endure ſo long, and not periſh in the meane time, as are Lemans, Oringes, *&c.* So a rent granted by tenant in tayle, for a releaſe of right in other Lands, is good, 44. *E.* 3. 21. becauſe for the benefit of the eſtate tayle: And *W.* 2. *De donis, &c.* intends not to reſtraine that which amends the eſtate tayle, So Parſonages and Vicarages are within the words, but out of the ſenſe and intent of 1. *E.* 6. *cap.* 14. which inlargeth the words of the Statute, and maketh that Caſes within the like miſcheife, ſhall be within the Purview by equity; as by the Book of entrys, *fol.* 406. a man ſhall recover double damages for coſts ſuſtained with force, by equity of 4. *H.* 4. *cap.* 8. which gives this for diſſeiſen of the Land: So that Executor which cometh firſt by diſtreſſe ſhall anſwer by equity of 9. *E.* 3. *cap.* 5. which ſpeaketh of Executors by equity of *Glouceſter*, the Leſſor ſhall have waſt againſt the Leſſee for half a yeare, or for twenty weeks, which pleads yeares. So 1. *E.* 6. *cap.* 12. which takes away Clergy for ſtealing Horſes, takes it away alſo for one Horſe, becauſe included in the Plurall Number; and there-

therefore *Plowden* diſallows 2. *E.* 6. *cap.* 33. which taketh away Clergy for the ſtealing of one Horſe, as a ſuperfluous Statute, and was made in vaine: And ſo 1. *E.* 6 cannot of Law but morall vertue which reforme the Law, and the other equity is, *Quaſi equality*, becauſe in the like reaſon, in the like Law.

Sobye *againſt* Molins.

H. 27. *El. in the Kings Bench. Attachment upon prohibition.*

TIthes ſhall be payd for the Boughs of Hornebeame, Haſell, Sallows, Maple, and ſuch Trees which are not fit for building, and ſo of the Trees themſelves, although that the Trees and Boughs are above the age of one and twenty yeares; for they are not great Trees which are exempted and priviledged of Tithes, by the Statute of 45. *E.* 3. *cap.* 3. or rather by the Common Law, in affirmance of which this Statute was made, as appeareth, 50. E. 3. 10. But Tithes ſhall not be payd for Aſhes, Oaks, and Elmes, Beech, and ſuch like Trees which are fit for building, and of the age of twenty yeares, nor for the Branches of them which are of the age of twenty yeares; *Quere*, if the Branches are within ſuch age as the Timber trees which uſe to be lopped and lopt if Tithe ſhal be payd for them; and it ſeemeth Tithes ſhall be payd of them by the Book.

The uſe at this day is upon ſuggeſtion to 471
have a prohibition, that the party ſhall be bound by Obligation, or Recogniſans to the

King,

King, to preferr a Bill of attachment againſt the party which ſues in the ſpirituall Court, if he requires it, and upon it to declare and joine iſſue, or demurr upon the right of Tithes, and award conſultation, which *Plowden* held vicious: Firſt, for that the Defendant is not Actor, and therefore may not have conſultation upon ſuch proceedings: Secondly, For that the Judgement upon the Attachment ought to be to acquit or attaint the party of the Contempt, and not proceed upon the right of Tithes: Thirdly, For that the Plaintiffe cometh into the Court voluntarily (*Scilicet*) by his Recogniſans) to exhibit his Attachment, where he ought to be brought in voluntarily by Proceſs: Fourthly, Becauſe the ſuggeſtion of the Attachment is falſe: Fifthly, For that if the Plaintiffe will not proceed, the Defendant hath no remedy, but a Recogniſance forfeited to the King; But *Plowden* held it to be the beſt courſe after the prohibition, that the Defendant ſues out a *Scire facias* againſt the Plaintiffe, *Quare conſultatio concedi non debeat*: And upon this the Plaintiffe may declare, and the matter ſhall be tryed, and the Defendant may have conſultation, and then he will be an Actor.

Sanders

Sanders and Archers Case.

H. 18. El. the Report of the opinions of Dyer, Cheife Justice, and Barham, Justices of Assises in Warw.

An *Archer* gave Poison to *Sanders* to Poison his Wife, 474
and *Sanders* gives this to his Wife in a roasted Apple, which did eate part of it, and gave the residue to their daughter, being an Infant, and after the Wife recovers, and the Infant dyes, and it was adjudged Murder in *Sanders*, for which he was hanged, but not in *Archer* for he was acquit to be no accessary to this Murder.

First, For that *Sanders* had an evill intent of Murder at the beginning of his Act to kill his Wife; and therefore the consequent of his Act by which the Daughter dyes, shall be adjudged according to the commencement; So if a man shoots at one, and kills another, or lyeth in waite to kill one, and kills another; otherwise it is where he hath no ill intent of killing any, as to lay poyson to kill Rats, and one eates of it and dyeth.

Secondly, The consent of *Archer* to kill 477
the Woman, may not bee conjectured further then he gave it; and therefore shall not extend to the death of the daughter which is another distinct Act; Otherwise it is if one had followed the other in one person: As if I command you to rob *J. S.* and he resists, and you kill him. So if I command you to beat him, and he dies of the battery: So if I command

mand you to burn the House of *J. S.* and you doe it, and by the fire the House of *J. D.* is burnt, I am accessiary to both, because the commandement reacheth to all the sequell thereof, and is the cause of it; and therefore
474 I shall be partaker of what ensues this ill Act commanded by me; otherwise it is if I command you to robb J S. as he is going to *Sturbridge* Faire, and you rob his House in *Cheapside*, for this is another manner of Fellony, and there are severall Acts: As if I command you to steale a white Horse, and you steale a bay Horse, or an Oxe, or burne the House of J. whereas I commanded you to burne the House of B. there I am not accessiary; for that my assent may not be lyable to it, because it is a thing distinct and contrary to my commandement directly: But if I command you to kill J. and you kill him by another meane or Instrument another day or place then I command, there I am accessary, because the death is the principall matter, and the others onely the manner and forme, and the variance in the manner and forme of his commandement discharges not me to be accessary: But if I countermand this before you kill, I am not accessary, for the minde of the accessiary ought to
477 continue to doe evill at the time of the act done.

476 If one be pardoned of Murder, and the wife of the dead sue an appeale, and a stranger receives him, and gives him Meate and Drinke, knowing of the Murder and Pardon, he is accessiary to the Fellony againſt the Wife, although that he is not againſt the King, because this

this Fellony is diſcharged againſt the King, but remaines as to the Wife, *per Catlin*: But *Popham* held otherwiſe, becauſe that at the time of the receipt, there is not any offence continuing againſt the Crowne and Dignity of the King, for that he was pardoned before, and one cannot be acceſſary without offence to the Crowne. But *Plowden* held, that if the Goaler ſuffer him to eſcape after the Pardon, this is Fellony in him, becauſe he ſuffers a Fellon to eſcape; for that he was in for Fellony, for he was detained in Priſon at the ſuite of the Wife appellant.

Nicholls *againſt* Nicholls.

M. 17. & 18. *El. in treſpas.* THE Lord *Lovell*, 18. *E.* 4. Leaſe for life to *Thomas Wright*, and moreover grants that if he dyes without iſſue, that then the Leſſee ſhall have fee: And the Lord was attainted of high Treaſon by Parliament, 1. H. 7. and all his Land forfeit to the King: ſaving to every ſtranger ſuch right, title, and intereſt, which they had, as if the Statute had not been ever made; and after the Lord dyed without iſſue, and in 11. *El.* an Office was found. The queſtion was, whether the Leſſee ſhould have the Fee by the Condition and the ſaving. And adjudged that he ſhould have the Fee.

1. That all the Fee Simple paſſeth not out 482
of the Lord *Lovell*, but continues alwayes in him untill the Condition which is precedent to the eſtate be performed. 14. *H.* 8. 17. *Wheelers Caſe* 10. *Aſſ.* 15. 6. *R.* 2. *Pleſſingtons Caſe* and 12. *R.* 2.

R. 2. That Action ſhall be brought againſt Leſſee for years, upon condition to have Fee and the Leſſor together, a Condition precedent ſhall have relation to the Livery for to avoid incumbrances for veſting the Fee which was at the time of the performance: Husband and Wife may not take by Moities, yet they ſhall vouch
483 upon a Feoffment made to them before the Coverture, becauſe that although they were ſole when the Warrant was made; yet were Covert when the Recovery was. So a Reverſion is granted when they are ſole; and when they have intermarried, the tenant attornes to them, they have not diſtinct Moities, becauſe then the Reverſion ſettles in them, not to grant when ſole; and ſo time in which the thing veſts is ſpecially to be conſidered.

2. That the eſtate in Fee appointed by the Condition, nor Reverſion, becauſe it commenceth at a day to come, nor a Remainder, becauſe in its veſting it drowns the particular Eſtate; but ſhall enure by way of inlargement of his Eſtate.

486 3. That the Freehold in Deede or in Law, (but a right or Title onely) is not veſted by the word (Forfeiture) in this Statute without an Office to finde the certainty of the Land which the party attainted had; as in 4. *E.* 4. 22. the Lord *Hungerfords* Caſe, for then the Statute of 33. *H.* 8. *cap.* 20. which now giveth Actuall poſſeſſion to the King; for Treaſon without Office ſhould be made in vaine and goe to attainders, hapning after this Statute of 33. not to thoſe before as our Caſe is. And if one be attainted of Treaſon, the Freehold and Fee remaineth

maineth in him and ſhall not be in the King untill Office found by the courſe of the common Law; for if he hath capacitie to take by new purchaſe, ſo he ſhall retain the antient, and ſhall be Tenant to the *Precipe*; but when he dieth the Land cannot deſcend to his Heire, becauſe the blood is corrupted but it ſhall Eſcheat to the Lord, if it be holden of a common perſon, or to the King in the nature of a common Eſcheat if it be holden of him, and not as an Eſcheat by Treaſon, untill Office, by *Barham* and *Dier*. To the firſt Objection it was ſaid, That the Condition performed which is a reall agreement, ſhall diveſt the ſtate in Fee out of any ſtranger which hath the Reverſion without privity as by grant, Eſcheat, &c. For that the Land is charged with this agreement reall, in whoſe hands ſoever it cometh, and therefore the Fee ſhall veſt in the Leſſee by the performance of the Condition diſcharged of all incumbrances made after the Condition, and the previty there is deſtroyed by the Act of the Leſſor. So 6. *R.* 2. *Pleſſingtons* Caſe, where a man leaſes for yeares upon Condition performed to have Fee, after levies a Fine; the Leſſee performes the Condition, he ſhall have Fee of the Conuſee, but by *Belknap* there he ſhall have the moneys which the Leſſee by his Condition ought to pay: otherwiſe it is if the privity be deſtroyed by the Act of the Leſſee, as where the Leſſee grants his Eſtate, there the Fee ſhall not veſt in him nor his aſſignee 4. (*fol.* 483.)

5. For anſwer to the ſecond Objection, it was ſaid that the Condition ſhall be ſaved by the words which ſhall extend to all Condi- 487

tions,

ohs, Rents, Profits, or other things out of, or in Land, and the ſaving of the right of him which hath not offended ſhall be taken beneficiall. By ſome, right is where a thing is taken away from another by wrong Title, is where a man hath cauſe to have the thing which another hath, and hath not Action. Condition is a poſſibilitie to have Title. Action is a ſuite given by the Law. Intereſt is part of the Eſtate of the Land, as a Leaſe for yeares: or execution by Statute, (*fol.* 484.)

6. The anſwer to the third Objection, The Leſſee ought not to ſhew in pleading that he is not excepted in the Statute, for that he gains not any new thing, but will retain the old; and alſo becauſe the Statute is to his diſadvantage, but that he ſhall take benefit of a Statute ſhewing it.

7. For anſwer to the fourth Objection, it was ſaid, that admitting that the Fee here ſhall be forfeited to the King without Office, yet the Condition ſhall draw it out of him without Petition, or *Monſtrans de droit*, by ſome, but *Quere* thereof; for otherwiſe it ſhall not veſt at the time of the death of the Lord *Lovell*, it ſhall not veſt at all, for it is appointed to him, as if the Leſſee here had entered into Religion, and the Leſſor without being attainted, had died without iſſue, after the Leſſee is deraigned he ſhall not have the Fee, becauſe it may not veſt in him at the time of the Condition performed. So if he was diſſeiſed at that time; And ſo here for to avoid the inconveniency by the operation of the Law or former agreement,

a thing shall be devested out of the King at the instant of the Condition performed without any such circumstance, As Tenant in Taile discontinues; the Discontinuee infeoffs the King by Deed inrolled, the King Leases to the Tenant in Taile for life, with the Remainder to his Issue for life, the Lessee dies, the Issue, is remitted by the remainder falling to him, and the Fee devests out of the King without any circumstance. And so a Remitter shall defeat the Estate of the King, and an Oshce of the King shall defeat the Remitter, (*fol.* 488.) as 3 *E.* 4. 25 in the Earle of *Northumberlands* Case, by relation or if the Disseisee enters after the Attainder of his Disseisor. Possession of the King by Office, shall not be removed without Petition; 488
but if he enter before his Disseisor be attainted, he shall be removed without Petition, because the Title of the King there is more antient, and the Office shall have relation to the Attainder onely for the profits, although it relate to the time of the Treason for to avoid mean Acts and Incumbrances. So Tenant in *Capite* maketh a Lease for life, rendring Rent with clause of Re-entry for not payment, and dies, his Heire within age enters for the Rent arere: An Office is found, the entry of the Heire for the Condition broken is avoyded by *Lovelace* for the possession of the Heire, by force of which he entered, is utterly defeated by Relation, which intitles the King to the Grant. And so the entry of the Heire for a thing not due to him, shall be adjudged *Tortius* by relation. So if Trespasse, 19 *E.* 4. 2. where for things coming of the Land, as Grasse, *&c.* Office avoids the punish-

punishment against those which doe the wrong, and takes it away by relation of the Office (which Intitles the King, because of the Escheat before the Trespasse) an Action once good: But for the entry into the Land, or breaking his Fences, which ariseth not from the Revenue of the Land, the Action is not gone by the Office.

If an Office, *virtute Commissionis*, be pleaded, he ought to shew the authority given by it, and the execution thereof accordingly; because persons appointed by Commission, have not any other then what is appointed to them by the Commission: otherwise it is of an Inquisition taken, *virtute Officii*, before the Eschcator, Sheriffe, Steward of a Leete, &c. for that their authority appeareth to the Court judicially, because it is known by the Law; for that they are Officers of the Common Law.

A Remainder ought to vest when it is appointed, otherwise it shall never vest. The Kings Pardon shall not excuse any man for the repairing of a Bridge which ought to do it, because it shall not take away the Interest that the Subjects take therein. So a man pledgeth a Jewell for ten pound and after is attainted, the King shall have it without paying of the ten pound. So 13. *R.* 2. the Earle of *Kent* had return of certain Cattell in *Replegiari* and the Proprietor of them is attainted, the Earle shall keep them against the King, untill he be satisfied of the thing; because the Prerogative will not give any prejudice to another.

Ludford *against* Gretton.

M. 18. & 19. *El. in the Kings Bench, Trespas.*

A Warrant to make Letters Patents, was directed by *H.*8. to the Chancellor, which entered not the day of the Receit of the Warrant in the Record according to the Purview of the Statute of 18. *H.* 6. *cap.* 1. And yet the Letters Patents made thereupon were adjudged good. For that the Purviewe of the Statute maketh Letters Patents void onely, for the variance between the date of the Patent, and the day of the entery of the Warrant. And the Court held three manner of Patents good upon the Statute.

1. If no Warrant be made at all, it is good by the Common Law, and not void by the Statute, because there is not any variance.

2. If there be a Warrant, and the day of the delivery of the Warrant be not entered, as in the Principall Case.

3. If the day of the delivery of the Warrant be entered, and the Patent dated after the day of the delivery, for this variance is out of the mischief of the Purview, which was in antedating of Patents before the delivery of the Warrant, and not after dating, and yet is within the words, but out of the intent of the Act.

Records shall have Relation to their date, and cannot be averred contrary to the date, nor to vary from it, because it tends to the discredit of an Officer of Record. Deeds relates to the Livery

Livery, and date in Deeds concludes not any to aver the contrary.

Grendon *againſt the Biſhop of* Lincolne.

HENRY the eighth, being ſeiſed of an Advowſon in the right of his Crown, preſents *J.S.* and dies, E. 6. by his Letters Patents, grants the advowſon to the Dean and Chapter of L. and their Succeſſors in Fee; and alſo grants to them Licenſe and Liberty, *virtute authoritatis ſuæ Regiæ ſupremæ & Eccleſiæ quæ fungimur*, that they ſhall retain the ſaid Advowſon, and all the Profits thereof for ever to their proper uſes, whenſoever the ſaid Church ſhall become void. And after the death of the ſaid Incombent, the ſaid King *E.6.* preſent his Clerk to the ſaid Church, which was Admitted, Inſtituted, and Inducted; and adjudged no uſurpation, which ſhall put the Dean and Chapter out of poſſeſſion.

P. 19. El. in the Common Pleas, Quare Impedit.

If the Plaintiffe alledge matter ineffectuall, as diſcent, *&c.* and the Defendant ſhew a matter in Law, which upon the Law diſcuſſed, proves the ſaid matter alledged by Plaintiffe, true or falſe, there he ought not to take a traverſe, for then the Jury ſhall try this matter in Law, which properly belongeth to the Court to diſcuſſe, *Per Curiam.*

1. Appropriation of an Advowſon ought alwayes to be made to a body Politicke, or Corporation Spirituall, being Patron of the ſaid

Advowſon, and ſuch Parſon onely is capable of an Appropriation, and no other; and by the Law ſuch Parſon in Parſonee may not grant over his Incumbency, no more then an Incumbent of a Parſonage preſentable at this day, nor any other ſhall have it, becauſe it is appropriate to his Parſon, 3. E. 3. 1. The Caſe of the Templers, that by their diſſolution, the Appropriation was diſſolved, And yet was firſt ordained, when ſuch Parſons by incroachment and ſufferance were made Parſons in Parſonees, which could not ſay Service, nor Adminiſter the Sacraments, as Deane, and Chapter, Nuns, Abotteſſes, *&c.* which was a thing horrible by the Lord *Dyer*.

2. Every Appropriation ſhall be made by the King, for the loſſe which he may have, otherwiſe as King, by reaſon of the Tenure, and by the ordinary Supreame, or Inferiour for the intereſt, that they ought to have in ſeeing the Cure ſerved, & by the Patron to whom the Appropriation ſhall be made; and thoſe three are Actors in the Play, as *Dyer* ſaid,: But here the Appropriation made by the King, which is alſo Supreame ordinary by the Statute of 25. *Hen.* 8. which transfers to him the Authority of the Pope, is good. As the Deane of Wells Aſſigne to the King good by the Court: becauſe he is Supreame ordinary by the Statute of 25. *Hen.* 8. in Sir *John Pollards* Caſe againſt *Waldron*, and here the King doth three things. Firſt, he grants the Advowſon. Secondly, he maketh the Appropriation as Supreame Ordinary. Thirdly, he giveth his conſent as King, fol. 501. if time of Lapſe be devolved

to

to the King, hee ſhall preſent as Supreame Patron, in reſpect that the Advowſon is holden of him mediately, or immediately.

If the Appropriation be made without Licenſe of the King (be the Advowſon holden of him, or of a common Parſon) the King ſhall ſeiſe the Advowſon, and ſhall have the Preſentments, untill hee be ſatisfied of the Fine by his Prerogative, and as in the name of a diſtreſſe. 21. E. 3. 5. And there it is ſaid, That the Appropriation is not Mortmaine, becauſe it is not any tranſmutation of the poſſeſſion, nor Subſtraction of Services, but the Tenure remaineth, as it was before.

3. The Appropriation may be made by words future when the Church is full, although that the Incumbent hath the Fee and Inheritance of the Church, and none ſhall medle with it which is his in his life; but otherwiſe, it is of preſent words, and the proper time to appropriate it, is, when the Church is void, becauſe then it may be executed preſently: But the Patron cannot preſent when it is full, by future words (*ſcilicet*) that he ſhall be incumbent, when the Church ſhall be void: For that he hath not Title to Preſent before the avoydance. If the King preſents to an Advowſon, and appropriate the Church to a Deane and Chapter which maketh a Leaſe for yeares in the life of the Incumbent; this is a voide Leaſe after the death of the Incumbent, by *Plowden*, for that at the time of the making of it, they had nothing in the Rectory, and the

Appropriation was not executed untill after the avoydance.

4. An usurpation may not be upon a Parſon in Parſonee, for that he is perpetuall Incumbent, and two Incumbents cannot be in one Church, 38. H. 14. 39. H. 6. 21. and 27. and there cannot be ouſted by wrong, nor have right of Advowſon, for he is not out of Poſſeſſion, and if one preſents to ſuch an Advowſon Appropriate, and the Clerk is admitted, Inſtituted, and Inducted, by ſix moneths, yet the Church is not become Preſentative, nor by any other Act, except onely where the Parſon in Parſonee himſelfe preſents; for there, *volenti non fit injuria*, by *Manwood*, and *Dyer* the diſſolution of the Corporation, to which the Advowſon is Appropriate, is a diſappropriation of the Advowſon, and the Lord, of whom it is holden may Preſent. If a Deane and Chapter ſeiſed of a Mannor, to which an Advowſon is Appendent, and the Church is Appropriate to them, and after they make a Feoffement of the Mannor, with the Appurtenances, this diſappropriates the Advowſon; for by ſome it paſſeth Appendent by the common Law, becauſe the Appropriation deſtroyes not the Appendency; But now by the Statute which maketh lay Perſons capable of Parſonages Appropriate, they are ſevered from Mannors by the intent of the Act, and by the grant of the Parſonage Appropriate, which now may be granted to a common Perſon, and the Advowſon ſhall paſſe. 501

Foure answers to the foure exceptions of the Plea.

First, The first exception is because the Patent is not pleaded with a *Non obstante*, of the Statute of Mortmaine, and therefore not good by *Dyer*.

But *Plowden* held the contrary, for that the Grant is good untill Office found, and then hee may well pleade a licence for that time; also the Patent is *Excerta scientia*, which countervailes the clause of *Non obstante*, for that implies that the King was knowing of the Law; for ignorance indeed may be allowed in the King, ignorance in Law not; So if the King grant Lands to his Villain, the Land passeth untill Office; but it is no infranchisement, because if he was his Villain or not, is a forrain matter, and not apparent to the King. And the Kings Grant shall not enure to two intents, where one is forrain matter. The clause of *Non obstante*, is requisite in a Patent, to be Sheriffe for life, 2. *H.* 7. because the Statute saith by precise words, That he shall not be Sheriffe above one yeare. So a Patent to a Murtherer for pardon; and that he shall not finde sureties, for his good behaviour ought to have a *Non obstante*, 10. *E.* 3. because this Statute avoided the Patent by precise words, without such surety. But the Statute of Mortmaine doth not so here, but giveth entry or seisure for a paine, admitting the Grant to be good.

The

The ſecond exception was, that the Patent made not them Parſon by expreſſe words by *Dyer*.

The ſecond exception was anſwered by *Plowden*, who ſaid, becauſe the words amounted to as much, and for that the Kings appeared to be ſo, that it ſhould not be void, becauſe *Ex gratia & mero motu*. 503

The third exception made by *Dyer*, was, that they did not plead that they entred.

But *Plowden* anſwered that, becauſe the Parent granted them power to reraine, *&c.* And alſo they pleaded that they were ſeiſed, which implies an entrie, and in the Common Pleas, uſe upon poſſeſſion executory ſhall ſay ſeiſed onely, without ſaying, that he entred and was ſeiſed.

The fourth exception that was made by *Dyer*, was, for that they pleaded that they were ſeiſed of the Rectory of the Parſonage of the Deane, in the right of their Cathedrall Church of *Worceſter*, whereas it ſhould be in the right of the Church of the Deane.

Plowden anſwered the fourth exception thus, That they plead the ſeiſen of all the intire thing, otherwiſe if it were of parcell of it; or things pertaining to it, for there they ſhould plead that they were ſeiſed of it in the right of the Church of the Deane.

But Judgement was given for the Biſhop.

Eare

Eare *against* Snow *and others.*

514 TEnant in taile and his Wife (which had nothing in the Land) ſuffer a common Recovery in 23. *Hen.* 8. to his owne uſe in Fee, the Husband by his Will in writing, deviſeth the Land to J. S. and after the Statute of 27. *H.* 8. is made, and after that he publiſheth his Teſtament of new, and dies, the iſſue in taile enters, J. S. dies, his heire within age, the iſſue in taile dies, the heire of J. S. enters upon the Son of the iſſue in taile: And adjudged lawfull. And no Remitter, but that the eſtate taile ſhall be barred by the Recovery, notwithſtanding the overliving of the Wife; for the Wife was named onely to be barred of her dower, and foraſmuch as ſhe had not any eſtate, nor no loſſe, ſhe ſhall not recover any eſtate, nor any recompence; and beſides, the eſtate recovered is an eſtate taile, as the eſtate
515 loſt was, to which the Wife was a ſtranger, and although ſhe ſhall have the recompence in value; yet the iſſue in taile might enter and out her, becauſe the loſſe is his and not to the Wife, and he ſhall not be eſtopped by concluſion of his Anceſtors by joining his Wife in the Voucher, and beſides it is uncertaine what eſtate the Wife ſhall have in the recompence.

H. 20. El. in the Kings Bench. Fitch. firme.

Welkden *against* Elkington.

H. 20. El. in the Common Pleas. Treſpas.

IEſſee for yeares deviſe that his Wife ſhall have and occupie the terme for ſo many yeares as ſhe ſhall live, and after her death he gave and bequeathed the reſidue of the ſaid yeares of the ſaid Leaſe, then not expired, to his Son, and his aſſignes, and made his ſaid Wife his ſole Executrix, and dyed, the Wife entred, agreeing to the Legacie, and after alienes the terme, and the alienee granted it againe to the Wife, and the Wife died within the terme: And adjudged that the Son or his Adminiſtrator ſhall have the reſidue of the terme. 519

Aſſent to the particular eſtate ſhall reach to the Remainder alſo, but an aſſent to the deviſe of a rent ſhall not extend to the deviſe of the terme, and the deviſe is made of a rent, or common out of the terme, and after of the Land it ſelfe; payment of the rent by the Executor or his ſufferance for the Deviſee to uſe the common, is not execution of the terme, becauſe the terme is one thing, and the profit out of it is another; but where foure yeares of a terme is deviſed to one, and the remainder to another; there otherwiſe it is becauſe all is of one ſame thing, *fol.* 621. 524. ſo the ſame *fol.* 541.

First, The deviſe to the Wife for her life is not an abſolute deviſe of the intire terme, but conditionally, or upon limitation (if ſhe lives

ſo

ſo long) for if ſhe dies, her Intereſt is determined by the limitation, and deviſe to him for his life by implication (becauſe the reſidue of the terme is deviſed to the Son after the death of the Wife, in which is implied that the Wife ſhall have it for her life) and alſo determinable by the limitation as aboveſaid, and the deviſe to the Son ſhall be expounded to precede the deviſe of the Wife, and ſo both ſhall ſtand, *fol.* 522. 523. & 624.

519

Secondly, The deviſe to the Wife and Son is of one ſame thing (*ſcilicet*) Of the Land it ſelfe, and the Wife ſhall have the Collaterall occupation onely of the Land by the deviſe; but the very Intereſt and terme of the Land, ſhe ſhall have conditionally, and ſo two parties of one terme, the one to the Wife, and the other to the Son, and then the execution of the deviſe in the Wife ſhall be execution of the Legacie to the Son.

524

Thirdly, The Alienation of the Wife hath not deveſted the intereſt of the Son, which is accrued to him by the Condition or limitation, nor extinct the Condition or limitation which ſhall transferr the intereſt to him.

Executor being legatory of a terme by the deviſe of the Teſtator enters generally, he is poſſeſſed as Executor, becauſe it is his firſt title, untill he maketh election to agree to the deviſe.

520

A Termor grants his terme to one for life, the Grantee ſhall have the intire terme by *Popham*, becauſe for life which is a greater time then for yeares: But *Quere*, if he dies, if the Grant be determined. As Leſſee for yeares grants a rent to one for his life, he ſhall have the rent during

during all the yeares if he shall so long live, which time of life includes all the years which is a lessor terme; yet if he dies, the rent shall be determined by *Plowden, fol.* 525. and the Grantee hath but a Chattell in the rent, for he may not have freehold out of a Chattell. Lessee for yeares grants all his terme which shall be arreare after his death, this is voide for the uncertainty; for by the reservation of the terme for his life, he hath reserved all the terme, and therefore the Grant which is but one sentence without any *Habendum*, is voide, 7. E. 6. (by devise good) otherwise if he had granted his terme *habendum*, after his death, there the Grant is good, and passeth the terme presently, and the *habendum* is void for the Repugnancy: But *fol.* 156. it is void, 521
9. *H.* 58. A man maketh a Lease for ten years, after maketh another Lease for six, to commence the same day, the second is void, and he shall not maintaine an action of debt against his Lessee, although the Lessee for ten yeares upon render, because during the ten yeares he may not contract with another, for a Lease to take effect during this time. Implication in a devise giveth an estate for life to the Wife, 13. *H.* 7. 17. profit to be taken out of the Land is a distinct thing from the interest of the estate. Execution of an occupation of a thing not of property it selfe, as in a devise of a Book to use, as 37. *H.* 6. 30. Condition 522
or possibility goes in privity, and cannot be limitted to a stranger. *Circum locution* in a devise, or Lease, is equivalent to a direct Grant, as to have from day to day during life, is all

one.

one. Intent ſhall be obſerved in the Expoſition of Wills, as if one deviſe his Land by the premiſes to one, and after deviſeth the rent to another out of the ſame Land, by the ſayd Will this is a good deviſe of the Rent firſt, and after of the Land in ſenſe, and ſo by expoſition the words ſhall be altered, and ſo marſhaled, that the intent may take effect: So a termor deviſeth all his terme to his Son, nevertheleſſe his Will is, that his Wife ſhall have it for her life, holden a good deviſe to both by converſion of the words. So a Remainder to the Church of Saint *Andrew* in Holborne, good by deviſe, 21. *R.* 2. although the Deviſee is not capable, becauſe the Teſtator intended that the Parſon ſhall have it. *Ceſtuy q; uſes* at this day deviſe that his Feoffees ſhall be ſeiſed to the uſe of one A. in fee, this is a good deviſe of the Land: Adjudged in the Caſe of *Lingen*: (yet after 27. H. 8. he cannot have Feoffees to his uſe, becauſe the intent was, that he ſhould have the Land: So the Executor ſhall not ſell the Land according to the deviſe, but take the profits for two yeares to his owne uſe, the heire may enter, becauſe the intent of the Teſtator maketh this a Condition, 38. *Aſſ.* 31.

Incertainty in Contracts reduceable to certainty by contingent, ſtandeth good: As if I leaſe to one *habendum*, from the death of J. untill ſuch a Feaſt, which ſhall be in the year, 1620. good, if J. dye before that, otherwiſe it is void. Two properties of a terme, as where Leſſee for yeares which grants over his terme, enters for non payment of Rent, and retaineth

untill

untill he be paid his Arrerages thereof: So of a Conuſee of a Statute, which hath the Land extended, ſo upon a Leaſe for yeares of a Mill, except the Profits to the Leſſor for his life, and adjudged a good Exception: And if the Leſſor enters, he hath a property incertain, and the Leſſee another, 39. H. 6. 37. 8. So it is of Sheepe letten for to compeſter, or a Chain of Gold pledged, 5. H. 71. they have one Property, and the owner another.

Ceſtuy que uſe deviſe the Profits and Iſſues of his Lands, fol. 509. b. (*Ceſtui que uſe*, before the Statute of 27. H. 8. Deviſe his Land, and after the Statute, publiſhes his Teſtament of new, the Land paſſeth by the Statute of 32. H. 8. See fol. 514. yet he was once countermanded by the Statute. *Ceſtuy que uſe*, deviſes that his Feoffees ſhall ſtand ſeized to the uſe of himſelfe for life, with remainder over, this is a good Declaration of the uſe during his life, yet the Will cannot take effect untill his death, *Quere* of this Caſe, fol. 508. b.

Bransbie, *against* Grantham.

P. 20. El. *in the Kings Bench* E. *firme.*

AN Executor having a Terme, as Executor deviſes the Terme to a ſtranger, and maketh his Sonne Executor and dies, the ſtranger enters into the Land by the Aſſent and Conſent of the Executor. And after the Executor

cutor enters: And adjudged that his Entry was lawfull, and the deviſe voide: And by conſequence, the aſſent given to a voide thing, ſhall be alſo void, and ſhall not enure as a new grant; but onely an aſſent to the thing deviſed.

1. Becauſe that the Executor cannot deviſe any thing which he hath as Executor.

2. For that the Executor hath the Terme here, to the uſe of the Teſtator, and no man can make a deviſe of any thing, except that he hath it to his owne uſe: And therefore the Husband cannot deviſe the Terme of his Wife; And then when the Executor dies, his Executor hath it by Title before the deviſe as Executor of the firſt Teſtator, and the property that the Deviſor, had as Executor is determined by the determination of his Office of Executorſhip, which is ended by his death; and the laſt Executor hath it by Relation, as immediate Executor of the firſt Teſtator; (So an Executor cannot deviſe the goods of his Teſtator) and therefore the goods of the firſt Teſtator in the hands of the laſt Executor ſhall not be taken in execution for the debt of the laſt Teſtator, becauſe the laſt Executor hath them as immediate Executor to the firſt Teſtator, and to his uſe, as if they never had been in the laſt Teſtator by Relation.

Hare *against* Bickley.

A Prebendary after Admiſſion and Inſtitution, and before Induction and Inſtallation, grants an Annuity for him and his Succeſſors: The Biſhop confirmes it, and after the Prebendary is Inſtalled, and on the ſame day of the Inſtallation, the Dean and Chapter confirmes alſo, and after the Prebendary dieth, and the Grantee bringeth a Writ of Annuity againſt the Succeſſor of the Prebend; and Adjudged, that it lyeth not, becauſe the Grant before Induction was voide. 518

Induction giveth to the Prebendary the poſſeſſion Temporall, and Freehold, (and the Confirmation is nothing without the Poſſeſſion:) And therefore without Induction, a man ſhall not have a Writ of Right nor Spoliation, Treſpaſſe nor Aſſiſe; otherwiſe, it is of a *Quare Impedit*. For in the firſt he alledges Eſplees, but not in the laſt, 26. *H.* 8. 3. But by the Admiſſion and Inſtitution he hath care of Soules, and is inabled to adminiſter the Sacraments, *&c.* And the Arch-Deacon ſhall make Induction to the Parſon and Vicar, but ſhall not make Inſtallation to a Prebendary; but the Deane and Chapter ſhall doe it. No Plenarty againſt the King before Induction, for that it is corporall ſeiſen and poſſeſſion, 38. E. 3. 10. So the King confirmes to the Collatee of a Biſhop, before he is inducted the Confirmation is voide, 11. H. 4. 7. 1. H. 5. 1. He which hath the Nomination is Patron, and he that pre-

presents it his servant, Induction is triable by the Countrey. So if Parson or not, and it shall be tried where the Church is, 32. E. 4. 7. and 33. A woman recovers in Dower, she cannot enter, but ought to have seisen delivered to her by the Sheriffe; so a Copyholder ought to be admitted by the Lord of the Manner, if it discends to him, before he shall have seisen in judgement of Law: so a Prebendary, Parson, or Vicar, before he is inducted, or installed, hath not seisen, nor is full Incumbent for to charge the Possessions of the Prebend, Parsonage, or Vicaridge.

Crosse *against* Howell.

THe Cookes of *London* were interrupted in 22. E. 4. *Tr.* 20. *El.* is by the name of two Masters and Governors of the Communalty of the Mystery of the Cookes of *London*, and in the 21. *H.* 8. they bargain and sell certain Land by the name of *A, B, C,* and *D.* Master and Wardens of the Craft, or Mystery of the Cookes of *London*, to *R. D.* for money without naming his Heires, and the Barganee enters and levies a Fine, with Proclamations, and five yeares passe. And adjudged that the Corporation shall be bound by the Fine, and Noneclaime; and therefore the entry and delivery of the Deede of their Lease to the Plaintiffe as their Deed, by him which had their Letter of Attorney so to doe, is meerly void.

the Kings Bench *E. firme.*

137

1. The bargain and sale was made for the variance of the Indenture from their name of Corporation, for they were incorporate Masters, and the Indenture is Master. And in the Indenture foure are named and their Charter Warrants but two Masters. Also the Charter is Masters or Governors, and the Indenture Masters and Guardians. So it varies in Guardians for Governors, and in (*et*) for (*or*) and the words, Craft and mystery are surplusage, and therefore void words, and do not prejudice the Deed; but for the other variance the Deed was adjudged void. And therefore the bargainee, by his entry is a disseisor. 538

2. The Fine with Proclamations and five yeares barres this Corporation, and all other Corporations, as Major and Communalty, Deane and Chapter, Colledges, *&c.* Which have absolute Estates in their owne right, and their Successors for ever, by equity of the Statute of 4. *H.* 7. Notwithstanding, that the Statute speakes onely of Men and their Heires, for that this Statute is taken largely for possessions of Lands by the Fine, and strictly against the ancient right, if they be remisse in their claime for five yeares, and the Act ought to remedy all the mischief; otherwise, it is of Corporations which have not any absolute Estate without others, as Bishop, Deane, Parson, Vicar, and Prebendary, *&c.* But every one of them shall be barred by Nonclaim by five years, and every Successor shall have new five years: So every Officer who hath Land appertaining to his Office, as a Parker, Forrester, Keeper of a Gaole, *&c.* shall be barred of Nonclaime

after

after a Fine levied by his disseisor, and five year past after Proclamations, his Successor not, if he doe not also permit 5. yeares Passe in his time.

3. A Corporation cannot be seised to another use, but onely a Naturall body, because they are not imprisonable to be compelled to perform the confidence, and a body Naturall shall not be imprisoned for the offence of their body Corporate, which is another body.

4. A bargain and sale without words, Heires shall give a Fee simple: But upon those two Points the Court was not resolved, because that the other two made an end of the Case.

An authority given by a Corporation to enter into Land, and claime it to their use, and after to make a Lease of it in their name is good, *fol. 535. b.*

Paramor *against* Yardley.

A Termer devises all his Terme to his Sonne, and besides saith, that his will and intent was that his Wife should have the Occupation and Profits of the Land during the Minority of his Sonne, to the intent that she with the Profits of it shall educate his children, and see his Will performed, and made his Wife his Executrix, and dies; the Wife proves the Testament, and educates his Infants accordingly, after sells the Terme to one, to whom the Testator was indebted, having then sufficient of the Goods and Chattells of the Testator to pay

H. 21. El. in the Kings Bench. Trespasse.

all his debts, besides the said Lease, and after he dies, the Sonne at his full age enters, and his Entry was adjudged lawfull, and his grant to the Plaintiffe good.

1. Because that the devise to the Wife is good during the Minority of the Sonne, and by the exposition of the Court, shall be intended to precede the devise to the Sonne in sense and intent, and the devise to the Sonne, to succeed. 540, 541. *a.*

2. For that the devise of the Profits and Occupation of the Land, is a devise of the Land it self, for that is the benefit and fruit of the Land; otherwise it is of the use of a Chattell personall as of a Looking-glasse, Mappe, Globe, or Booke; for there the use is a distinct thing from the property, *fol.* 541. *b.* and 541. *a.*

3. For that the Terme shall be executed in the Wife as a Legacy certain, untill she disagrees to it, because it is more for her benefit, and she may not have an occasion against her self as another may, otherwise it is of a Legacy certain.

1. The Common Law to make the intent of the Parties take effect, puts order to words contained in deeds without order, as the Release of the Disseisor, and Disseisee to the Lessee, for yeares of the Disseisor, shall be first, of the Disseisor, and after the Disseisee, otherwise it wanteth privity between him and the Lessee. So Tenant for life, Leases for yeares, and he, and him in Reversion confirmes the Estate of Lessee for yeares, *habendum* as Fee; The Law adjudgeth the Estate

540

of

of the Tenant firſt to paſſe for to make previtie, upon which Releaſe that of him in the Reverſion may enure to enlarge the Eſtate.

141 So a Termor for thirty yeares, and his Leſſee in Poſſeſſion for ten yeares, by himſelfe may not ſurrender for want of previty: And therefore his ſurrender ſhall be taken to ſucceed the other. Land is deviſed to one in Fee after a Rent out of it to another in Fee, good. So *fol.* 523. becauſe it ſhall be taken firſt deviſed, although it be ſubſequent in words. As the Will repeales the firſt, ſo the laſt part of the Will repeales to the firſt part of the Will which is contrary to it, becauſe he had ſuch Intent laſt, As a deviſe of Land to one in Fee in the premiſes, and in the end of the Will to another in Fee; But here is not any ſuch contrariety.

142 2. By grant of the Leaſe, land paſſeth during the Terme, becauſe the Leaſe contains the Land it ſelfe, and time in it: words equivalent to words uſuall ſhall have the ſenſe and force of words uſuall, as 5. *H.* 7. 1. Licence to enter and occupy Land for one moneth is a Leaſe, and ſo ſhall be pleaded. So that Land ſhall return *rediuit*, or diſcend, or to a ſtranger after the death of Tenant for life, ſhall be pleaded as a Remainder. So a grant of the nomination of the Advowſon is in ſubſtence a grant of the Advowſon; becauſe the profit of it reſts in the Nomination. So here words of Nomination, and Profits of the Leaſe, is as much as the Leaſe it ſelfe for the time, and not of diſtinct Profits to take alſo, becauſe the Executor here hath not remedy at the Common Law for the

Profits if she be ousted of it; and for this Legacy, she hath no remedy in the Spirituall Court, because she cannot sue her selfe there; also the Estate it selfe of the Terme shall be in the Wife, because the Sonne shall not have it untill full age, and then might drown his Profit, if she hath but profit to loose.

3. Alteration made by Operation of Law, where the Party hath not any, against whom to bring in his action, which is equivalent to a Suite, and Execution given to a Stranger, as of a Remitter: So a Debtor of twenty pound is made Executor, he may pay himselfe by way of Retainer, and hath property in the debt in selfe presently; because he cannot sue himselfe, and the Law giveth to him the like advantage as a Suite should be, which performes the charge of the thing thereby, he claimes the commodity annexed to the charge, as to keep Court of a Steward is a disseisen of his Fee: For the doing of matter of labour is a claime of the Commodity for his paines: So an Executor which hath a Terme devised to him, upon Condition that he pay 10 l. to a Stranger, payes the 10 l. this is consent and execution of the Legacy. So the educating of the Children here determines her Election, that she taketh the Terme as a Legacy, and her grant after reproves it not, but argues her inconstancy. If a Termer be indebted to one in a hundred pounds, and maketh his Will, and by it devise his Terme to his Sonne, and leaves assets to pay the debt, the Executor cannot sell the Terme to pay the debt, but shall pay it with the assets that he hath in his hands: Adjudged, because

becauſe he ought to perform all the Will (*ſcilicet*) Debts and Legacies, if there are aſſets. If the Executor diſagree in Deed to a Legacy certain this ſhall be preſently in the ſecond Deviſee of this bequeſt of a thing incertain to the 545 Executor, as of 20 l. and the Teſtator owern 40 l. and dies, having Plate, Oxen, Horſes, of every of them to the value of 20 l. this is not executed untill 40 l. paid, for he may Alien which of them he will, and the others have no remedy, if there be no more aſſetts; and may pay, and carve to himſelf before any other, as it is in 12. *H.* 4. 21. becauſe he is neereſt to himſelf, And therefore the Execution of the Terme deviſed here ſhall not be hindered by the not payment of the Legacies to others, nor Leaſe given to his Executor, ought to be ſold, and then in Legacies it is reaſon that Executor ſhall have preferment. A gift to his Executor of all his goods for performance of his Will, is no deviſe, and a void gift, becauſe the Law giveth them without theſe words: As if a Man deviſe in Fee his Land to his Son, and Heire, it is voyd, becauſe he ſhall have it without the deviſe by diſcent: So for to preſcribe, for to diſtrain for Rent ſervice voyd, becauſe he may diſtrain without preſcription; A deviſe of Fee tayle to his Heire is good, becauſe it is another Eſtate then he ſhould have by diſcent: So here the Eſtate deviſed to the Wife, which is but percell af the Eſtate (*ſcilicet*) during the Nonage of the Heire is good, becauſe ſevered from that, which the Law would have given to him; and the Clauſe for educating his Children, is not a thing Teſtamentory, nor

Legacy

Legecy to the Children, but is an intent annexed to the deviſe made to the Wife, by which ſhe by her entry hath the Eſtate deviſed to her as Legatory; And the Execution to the Wife is alſo to the Son, becauſe a deviſe, although the Eſtates are ſeverall, and is of the ſame effect, as if her Eſtate had bin deviſed to another, with the Remainder to her Son, and agreement or aſſent ſhall not be apportioned, as attornment by Tenant for life to the Grantee of the Reverſion for life extends to him in Remainder. So notice given by Tenant for life to the Lord, ſhall ſerve to him in Remainder in Fee, to compell the Lord to avow upon him after the death of the Tenant for life; So Rent accepted by an Infant at full age of his Leſſee for yeares hath made good the Remiander over.

An Intruder, cannot gain ſuch Poſſeſſion againſt the King, upon which he may maintain an Action of Treſpaſſe, becauſe the King may puniſh him, 19. *E.* 4, 2. and be ſhall not be doubly puniſhed; but againſt the Leſſee of the King, one may gain ſuch Poſſeſſion, that he may puniſh a Stranger treſpaſſor, yet he ſhall not gain no Eſtate from the Crowne for the Freehold, which irremoveablely reſts in the Crowne; And the King ſhall not alleadge Intruſion with a *continuando*, but divers dayes *& vicibus*; becauſe he gaineth not any Poſſeſſion by wrong, (*ſcilicet*) by the Intruſion againſt the King.

Walſing-

Wallinghams Case.

TEnant in tayle of the Kings gift, maketh a Feoffment in fee to a ſtranger, and after is attainted of Treaſon, and executed, having iſſue, and after this attainder is confirmed by Parliament with ſeverall rights and intereſts of Strangers; And it was adjudged that the Feoffee continuing his eſtate by the Feoffment, after the attainder ſhall be an Intruder, and this Judgement was afterwards affirmed in a Writ of Error brought in the Exchequr Chamber; But the contrary was adjudged in the Common Pleas, 17. *El.* between *Conway* and *Moulton*, that tenant in tayl ujall not forfeit any thing. *H. 15. El. in the Exchequ Intruſion.*

Firſt, That the Feoffment of tenant in tayl had not diſcontinued, nor deveſted the eſtate of fee in Reverſion out of the King, becauſe it is but a matter in Deed, which is tortious, otherwiſe it is of a rightfull matter of Record, as a Recovery upon a good title or rightfull matter in Deed, as a Remitter or Condition performed; As Alienee of tenant in tayle of the gift of a common perſon infeoffs the King by Deed inrolled, which revives to the firſt tenant in tayle which dyes, the iſſue enters, it is a Remitter, and therefore the Reverſion in fee is deveſted out of the King, and reſtored to the firſt doner, becauſe a former right; matter in Deed and in Law concurr together; So Leſſee for life to have fee if he doth ſuch an act,

act, after the Leſſor grants by Deed inrolled, the Reverſion to the King, the Leſſee for life performes the Condition, which is older then the title of the King; this older title, matter in Deed, and operation in Law thereupon, ſhall take the Reverſion out of the King, without other Suit or Circumſtance, becauſe bound with the Condition, and the fee ſimple ought to veſt in him at the ſame inſtant that he performes the Condition or never. But no tortious act, as Diſſeiſen, Intruſion, &c. may take the Reverſion out of the King.

Secondly, That by the Feoffment he hath not given the fee determinable, becauſe he had it not, nor an eſtate for life of the Feoffee, but onely an eſtate for his owne life, and ſo the Reverſion in tayle continues in him, which ſhall be forfeit by the Attainder, and by conſequence the eſtate of the Feoffee determines by the death of the Feoffor; but the Feoffee hath an eſtate for the life of the Feoffor diſcendable, and his heire ſhall be a ſpeciall occupant of this eſtate in baſe fee ſimple.

Thirdly, That the King ſhall have the eſtate tayle in point of Reverter, for that he had the pure fee before, and two fees of one thing cannot be together in one perſon (otherwiſe in ſeverall perſons) and then the King ſhall have the Land diſcharged of the eſtate tayle, and by conſequence of all eſtates, charges, and incumbrances, derived out of it, as Leaſes warranted by the Statute, and then the ſaving in the Statute for a thing before determined is void, as of a Leaſe voidable, made

by

by ſuch tenant in tayle, which the iſſue hath made good by the acceptance of the rent, and after of the eſtate tayle Eſcheated for Treaſon, or is determined for default of iſſue: So that the King hath in point of Reverter there, the Releaſe ſhall be void, and he hath nothing by the ſaving of the Statute: Adjudged in *Auſtins* Caſe, otherwiſe it is when the King hath it in point of forfeiture, as if the Reverſion be to a ſtranger, *fol.* 559. *b.*

What Livery and Seiſen is, and the validity of it, fol. 554. a.

Eſtate tayle ſhall not be in abeyance, nor any thing which another cannot have, for abeyance is onely for the benefit of a ſtranger, becauſe it cannot veſt immediately, 556. *a.* 562. *a.*

Eſtates in fee are three: Firſt, Pure fee: Secondly, Fee determinable: Thirdly, Baſe fee, which ſhall be in one when the pure fee is in another, *fol.* 557. *a.*

An eſtate tayle ſhall not be to anothers uſe, *fol.* 555. *a.* yet if tenant in tayle bargain and ſels the Land by Deed inrolled, the Bargainee ſhall have fee, executed by the Statute of 27. *H.* 8. which cannot be, except the uſe ſhall be raiſed firſt out of the eſtate taile, and ſo the eſtate tayle ſhall be to another uſe, *fol.* 557. *b.*

A Diſſeiſor or Intruder upon the poſſeſſion of tenant in tayle of the Kings gift, gaines not, except the eſtate for life of tenant in tayle, and

and therefore if he dye seised, the issue in tayle shall enter upon this discent, as I beleeve, *fol.* 558. *a.*

The Father maketh a Lease for life to his Son, the Remainder for life to her which shall be his Wife at the time of his death, this is a good Remainder, and shall be in abeyance untill the Wife be knowne, *fol.* 562. *a.*

Saving in a Statute contrary to the Explanation is voide, *Puton* and *Hides* Case, and *Austins* Case of a Lease, and the Duke of *Norfolks* Case, *fol.* 564. *a.*

The possession shall be awarded upon a Bill of Intrusion, which is but Trespas in its nature, 561. *a.*

Tenant in tayle grants his estate, there waste is dispunishable, during the life of tenant in tayle, because it is not but onely a priviledge annexed to it. Estates passe to the Grantee, and amount to words of dispunishable of waste, and not because he hath a greater estate then for the life of tenant in tayle. So 42. *E.* 3. 21. waste dispunishable in tenant for life (because the Lessor released all his right that he had in the same Land, and that he or his heires would not demand any right in the same, nor claime, nor challenge for the terme of the life of the tenant.) for that it amounts unto a Lease without impeachmeat of waste, *fol.* 556.

A Writ of Error abated by the dearth of the Lord Chancellour, because his Christian name and Sir-name, and Keeper of the great Seale, were put into the Writ, *fol.* 564. *b.*

FINIS.